NO. 92-1027

Supreme Court, U.S.
FILED
DEC. 1 1992
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In the Supreme Court of the United States

OCTOBER TERM, 1992

CRAYTON K. TURNER and
DONNA TILLMAN TURNER
Plaintiffs-Applicants

versus

OCEAN NYMPH SHIPPING CO., LTD. and
COLUMBIA SHIPMANAGEMENT LIMITED
Defendants-Respondents

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Trial Court and the Court of Appeals err in finding that Crayton K. Turner had no right to have a jury determine whether or not the vessel on which he was injured was negligent under the rationale of *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed 2d 1 (1981).

2. Did the trial Court and the Court of Appeals err in granting summary judgment in favor of the vessel on which plaintiff was injured in a situation where there is a multitude of disputed facts?

Respectfully submitted,

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LIST OF PARTIES

1. Crayton K. Turner, Applicant

2. Donna Tillman Turner, Applicant

3. Harold M. Wheelahan, III and Dawn Adams Wheelahan, attorneys for Plaintiffs-Applicants

4. Coastal Cargo, Inc., Applicant's employer

5. Cigna Insurance Companies, Intervenor, Applicant

6. Peter L. Hilbert, Kathleen K. Charvet, and the Law Firm of McGLINCHEY, STAFFORD, CELLINI & LANG, Attorneys for CIGNA Insurance Companies

7. Ocean Nymph Shipping Co., Ltd., Defendant, Respondent

8. Columbia Shipmanagement Limited, Defendant, Respondent

9. Robert H. Murphy, and the Law Firm of MURPHY, WILLIAMS, ROGERS & SLOSS, counsel for respondents

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

CRAYTON K. TURNER and
DONNA TILLMAN TURNER

Plaintiffs-Applicants

versus

OCEAN NYMPH SHIPPING CO., LTD. and
COLUMBIA SHIPMANAGEMENT LIMITED

Defendants-Respondents

PETITION FOR WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

REFERENCE TO OPINIONS

Applicants seek review of the following opinions:

1. Judgment dated September 3, 1991 granting defendants' Motion for Summary Judgment and dismissing plaintiffs' claim with prejudice

2. Minute Entry dated September 3, 1992, giving reasons for judgment

3. October 1, 1991 Minute Entry denying plaintiffs' Motion for a New Trial or, alternatively, for Relief from Judgment

4. The September 3, 1992 opinion by the United States Court of Appeals, Fifth Circuit

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The judgment to be reviewed is an opinion by the United States Court of Appeals, Fifth Circuit, rendered September 3, 1992.

2. This Court has jurisdiction pursuant to 28 USCA 1254 and under Supreme Court Rule 10.

STATUTES INVOLVED

The following statutes are involved in this case:

1. The Longshoremen and Harbor Workers' Compensation Act, 33 USCA, 901 et seq (text in appendix)

2. Diversity jurisdiction 28 USCA 1332

CONCISE STATEMENT

(1) Nature of the case and course of proceedings and disposition below.

Plaintiffs, Donna Tillman Turner and Crayton K. Turner, (hereinafter referred to collectively as "Turner") have made a claim under the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et seq, and under the diversity jurisdiction of this Court, 28 USCA 1332, against the owners and operators of the M/V SUCRE, Ocean Nymph Shipping Co., Ltd and Columbia Shipmanagement Ltd. (hereinafter referred to collectively as "the vessel"). Turner's employers' workers' compensation carrier, CIGNA Insurance Companies (hereinafter

referred to as "CIGNA") intervened for benefits paid under the LHWCA.

The vessel filed a Motion for Summary Judgment claiming that there were no genuine issues of material fact relevant to the Motion for Summary Judgment and that, considering the facts, plaintiffs' claim must fail because there was allegedly no evidence of vessel negligence. Turner responded, contending that there were multiple disputed issues of material fact and that the motion should be denied. CIGNA joined in Turner's opposition. The Trial Court granted the vessel's motion, dismissing Turner's claim with prejudice. Plaintiffs appealed the lower Court's ruling to the United States Court of Appeals for the Fifth Circuit. That Court affirmed the trial court.

(2) Statement of Facts.

The M/V SUCRE was a general cargo vessel owned by Columbia Shipmanagement Ltd. and operated by Ocean Nymph Shipping Co., Ltd. on 21 January, 1990. Coastal Cargo Company, employer of Turner, contracted with the charterers of the vessel to provide stevedoring services to the vessel at the Poland Avenue Wharf in New Orleans, Louisiana, during January, 1990. Turner was assigned by his employer to act as a longshoreman during cargo operations on that date. (Appendix, page 19) On that date, Turner was seriously injured when he slipped and fell from a container aboard defendant's vessel landing on the dock below. (Appendix, pages 10 and 23) There was oil located on the top of the container from which plaintiff slipped. (Appendix, page 2) There was evidence that the ship's crane near which the container from which plaintiff slipped was located, leaked oil (Appendix, page 24) and that the oil was on the container when the vessel arrived in the Port of New Orleans. (Appendix, page 24) Plaintiff's contentions were:

that the existence of oil on the top of a container in an area where the vessel knew that stevedores would have to work is a breach of the vessel's duty owed to stevedores; that this defect was hidden in that it was located on top of a container which had other containers located on top of it and that the vessel failed to warn the stevedores of this defect; that this oil was a hazard under the control of the vessel, in that the vessel's own crane created the hazard; and, lastly, that the vessel had knowledge of the oily container top (or was charged with such knowledge) and that the vessel further had knowledge that the stevedoring operations with regard to this container were nevertheless being conducted by plaintiff's employer and, in this situation, the vessel should have intervened.

The District Court granted the defendant's Motion for Summary Judgment and dismissed Turner's claim. (Appendix, page 1) The Court of Appeals affirmed. (Appendix, page 6)

ARGUMENT

QUESTION NO. 1:

DID THE TRIAL COURT AND THE COURT OF APPEALS ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE VESSEL IN A SITUATION WHERE THERE REMAINS A MULTITUDE OF DISPUTED FACTS?

The oily container from which Turner fell was allegedly on the vessel when it arrived in the Port of New Orleans. In order to remove the other containers, this oily container was off loaded and then re-stowed aboard the M/V SUCRE on January 21, 1990. Cargo operations were performed by Coastal Cargo Company, plaintiff's

employer. Turner alleges that the oil on the container came from the cranes of the M/V SUCRE. Defendant disputes that fact. For purposes of ruling on the defendant's motion, the Trial Court asumed that the oil was present on the top of the container from the beginning of cargo operations and did not come from the stevedore's top end loader, but made no assumptions with respect to whether the oil came from the ship's crane. Nevertheless, the Court found that the defendants were entitled to Summary Judgment under *Scindia*, Supra. Turner urges that this Honorable Court reverse the Trial Court and the Court of Appeals because facts are in dispute and because *Scindia*, Supra, and its progeny, do not support the granting of a Summary Judgment.

FRCP 56(c) provides, in part, that "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Plaintiffs submit that there is substantial dispute as to material fact which should preclude issuance of a Summary Judgment in favor of defendants.

In support of its motion, the vessel listed twenty two allegations of allegedly uncontested material facts. Plaintiffs dispute seventeen of the twenty two allegations of fact listed by defendants. Turner's position is that the cranes on the M/V SUCRE constantly leaked oil on each occasion when it came into the Port of New Orleans. (Appendix, page 24) The container from which plaintiff slipped was stowed next to one of the ship's cranes when it arrived in the Port of New Orleans. There was oil on top of the container when it arrived in the Port of New Orleans. (Appendix, page 24) The defendant claims that the oil on the con-

from the loading operations conducted by plaintiff's employer. This factual dispute, standing by itself, should cause this Court to reverse the Trial Court.

Summary Judgment should only be granted when after adequate discovery, a party against whom such a motion is filed fails to make a showing sufficient to establish the existence of an element essential to that party's case. In such a situation there can be no genuine issue as to any material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317 322-23, 106 S. Ct. 2548, 2552, 91 L.Ed 2d 265 (1986) In the Matter presently in dispute, the source of the oil on the top of the container from which Turner slipped is one of *the* critical facts in this case and is hotly disputed. Summary Judgment therefore, should have been denied.

QUESTION NO. 2:

DID THE DISTRICT COURT AND THE COURT OF APPEALS ERR IN HOLDING THAT CRAYTON K. TURNER HAD NO RIGHT TO HAVE A JURY DETERMINE WHETHER OR NOT THE VESSEL ON WHICH HE WAS INJURED WAS NEGLIGENT UNDER THE RATIONALE OF *SCINDIA STEAM NAVIGATION CO. V. DE LOS SANTOS,* 451 U.S. 156, 101 S. CT. 1614, 68 L.Ed. 2d 1 (1981)?

From a legal standpoint, a shipowner, before turning his vessel over to a stevedore, must exercise due care to insure that the ship *and its equipment* are in such a condition that an experienced stevedore will be able, by the exercise of reasonable care, to carry on its operations with reasonable safety to persons and property. *Scindia Steam Navigation Co. v. de los Santos,* 451 US 156, 101 S. Ct. 1614, 68 L.Ed. 2d 1 (1981). The critical distinction between *Scindia* and Turner is that, in *Scindia,* the ship's winch

became defective after operations had been turned over to the stevedores; while in Turner, it is alleged that the cranes here were leaking oil not only before cargo operations were turned over to the stevedores, but also on several prior visits of the defendent's vessel to the Port of New Orleans. Therefore, whether the vessel's crew exercised control over cargo operations at the time of plaintiff's accident is irrelevant.

If a condition exists from the outset, the ship owner is charged with actual knowledge of the dangerous condition. *Hernandez v. M/V RAJAAN,* 841 F.2d 852 (5th Cir., 1988). Where a longshoreman is injured as a result of defective ship's equipment, the matter should be tried to a jury. There are circumstances in which a ship owner has a duty to act when a danger to longshoremen arises from malfunctioning of the ship's gear being used in cargo operations. *Viator v. Helenic Lines,* 558 F. Supp 700 (E.D. Texas, 1983). Where a vessel owner sets the stage for an accident, even if that event required the negligence of a stevedore to appear on the scene before it could occur, the allocation of the stevedore's fault to the vessel owner is reasonable. *Woods v. Sammisa Co., Ltd.,* 873 F.2d 842 (5th Cir., 1989).

It has been held that a Summary Judgment is inappropriate when disputed questions of fact exist regarding whether a slightly damaged gangway created "unreasonable risk of harm" and if the stevedore's decision to continue to use the gangway was obviously so improvident as to trigger the vessel's duty to intervene. *Randolph v. Laeisz,* 896 F.2d 964, 971 (5th Cir., 1990). It is submitted that if Summary Judgment was inappropriate in a case dealing with a slightly damaged gangway, it is similarly inappropriate in a case dealing with a leaky ship's crane.

Even after stevedoring operations have begun, the

vessel owner has a duty to intervene in the stevedore's operations when he has actual knowledge both of a hazardous condition and that the stevedore, in the exercise of obviously improvident judgment, intends to continue work in spite of that condition. *Scindia*, Supra.

"Vessel owner liability may arise: (1) if the vessel owner fails to warn on turning over the ship of hidden defects of which he should have known; or (2) for injury caused by hazards under the control of the ship; or (3) if the vessel owner fails to intervene in the stevedore's operations when he has actual knowledge both of the hazard and that the stevedore, in the exercise of obviously improvident judgment, means to work on in the face of it and therefore cannot be relied on to remedy it." *Masinter v. Tenneco Oil Co.*, 867 F.2d 892, 897 (5th Cir., 1989). The obviousness of a danger, although relevant to the first exception listed above, bears no significance to a vessel owner's duty caused by hazards under the control of the ship, which is exception number 2, above. *Masinter*, Supra.

A shipowner has no defense that a hazard was open and obvious. *Stassi v. American Commercial Lines, Inc.*, 720 F.2d 879 (5th Cir., 1983); 56 Tul. L. Rev. 1421 (1982); *Treadwway v. Societie Anonyme Louis-Dreyfus*, 894 F.2d 161 (5th Cir., 1990).

Maintenance and repair of a ship's winch (or crane) is the sole responsibility of the ship's crew. Where a longshoreman is injured as a result of defective ship's equipment, a reasonable jury could find that the ship should stop loading operations until the winch (or crane) could be made safe. There are circumstances in which a shipowner has a duty to act where the danger to longshoremen arises from malfunctioning of a ship's gear being used in cargo operations. *Viator v. Hellenic Lines*,

558 F. Supp. 700 (E.D. Texas, 1983).

Where a slip hazard exists in a work area when the longshoremen first boarded a vessel, a jury may find that a vessel owner breached the duty that it owed to the longshoremen to provide a reasonably safe place to work even if the accumulation of water and oil was visible and thus known to the longshoremen. *Treadaway,* Supra.

Even if a stevedore or its employees were negligent *and* that negligence was a proximate cause of the plaintiff's injury, only if a reasonable jury could reach no other conclusion but that the stevedore's negligence was the *sole* cause of the injury, should Summary Judgment be granted in favor of a vessel owner. *Gay v. Barge,* 266, 915 F.2d 1007 (5th Cir., 1990).

1. The District Court erred in granting Summary Judgment based on the first *Scindia* principle.

The first *Scindia* principle states that vessel owner liability may arise if the vessel owner fails to warn on turning over the ship of hidden defects of which he should have known. *Masinter v. Tenneco Oil Co.,* 867 F.2d 892, (5th Cir., 1989).

Respondent argues that the Court correctly found that the oil on top of the twenty foot container was open and obvious and therefore the vessel had no duty to warn the stevedores. However, both the Trial Court and the vessel ignore the fact that issues of great dispute exist as to which stevedores were aware of the condition, the extent of the condition, and certainly whether plaintiff was aware of the condition prior to his accident. Turner was rendered comatose for several weeks due to head injuries received in this accident and has no memory of the events surrounding

the accident. Some of Turner's co-workers saw the oil during daylight hours (the accident occurred late at night), others did not. Whether the condition was obvious and the source of the oil are both in dispute. Therefore, Summary Judgment should have been denied under the first *Scindia* principle.

2. The District Court erred in holding that the second *Scindia* principle does not apply to this case.

The second *Scindia* principle establishes that vessel owner liability may arise for injury caused by hazards under the control of the ship. *Masinter,* Supra.

It is not in dispute that the obviousness of the danger is not relevant to the second *Scindia* principle.

Plaintiffs submit that Summary Judgment here was inappropriate under the second *Scindia* principle. It has been held that a Summary Judgment is inappropriate where disputed questions of fact exist regarding whether or not a slightly damaged gangway created "unreasonable risk of harm." *Randolph v. Laeisz,* 896 F.2d 964 (5th Cir., 1990). It is submitted that Summary judgment is similarly inappropriate in the matter presently before the Court.

3. The District Court erred in holding that the third *Scindia* principle does not apply to this case.

The third *Scindia* principle states that vessel owner liability may arise if the vessel owner fails to intervene in the stevedore's operations when he has actual knowledge both of the hazard and that the stevedore, in the exericse of obviously improvident judgment, means to work on in the face of it and therefore cannot be relied upon to remedy it. *Masinter,* Supra.

Where a longshoreman is injured as a result of defective ship's equipment, a reasonable jury could find that the ship should stop operations until the equipment could be made safe. It has been held that there are circumstances in which a ship owner has a duty to act where the danger to longshoremen arrives from malfunctioning of the ship's gear being used in cargo operations. *Viator v. Hellenic Lines,* 558 F. Supp. 700 (E.D. Texas, 1983). Where a vessel owner sets the stage for an accident, even if that event required the negligence of a stevedore to appear on the scene before it could occur, the allocation of the stevedore's fault to the vessel owner is reasonable. *Woods v. Sammisa Co., Ltd.,* 873 F.2d 842 (5th Cir., 1989).

CONCLUSION

In affirming the District Court's granting of a Summary Judgment, dismissing the claims of a stevedore who slipped and was seriously injured as a result of the ship's crane's allegedly leaking oil, the Court of Appeals for the Fifth Circuit was incorrect. Factual disputes exist concerning the source of the oil and its obviousness. If the vessel created the hazard, then its obviousness is not relevant and the Summary Judgment should have been denied. If the obviousness of the oil is relevant, then a reasonable jury could find that the ship had a duty to intervene and the Summary Judgment should similarly have been denied.

Respectfully submitted,

HAROLD M. WHEELAHAN, III, A PLC

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504-866-8686

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to all counsel of record by placing a copy of same in the United States mail, postage prepaid, addressed to the offices of said attorneys this 1 day of December, 1992.

_____

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
SEP 4 8:16 AM '91

DONNA TILLMAN TURNER, ET AL.	CIVIL ACTION
VERSUS	NO. 90-0727
OCEAN NYMPH SHIPPING CO., ET AL.	Section "J"

JUDGMENT

Considering the Court's Minute Entry of September 3, 1991,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that there is judgment against the plaintiffs (Donna Tillman Turner and Crayton K. Turner) and in favor of the defendants (Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagemnent Limited), dismissed the plaintiffs' complaint with prejudice at the plaintiffs' costs.

IT IS HEREBY FURTHER ADJUDGED, ORDERED, AND DECREED that there is judgment against the intervenor (CIGNA Insurance Companies) and in favor of the plaintiffs and the defendants, dismissing the intervenor's petition with prejudice at its costs.

DATE OF ENTRY SEP 4 1991

New Orleans, Louisiana, this 3rd day of Sept., 1991.

/s/ Patrick E. Carr

UNITED STATES DISTRICT JUDGE

APPENDIX B

MINUTE ENTRY
September 3, 1991
CARR, J.

FILED
SEP 4 8:16 AM '91

DONNA TILLMAN TURNER, ET AL.	CIVIL ACTION
VERSUS	NO. 90-0727
OCEAN NYMPH SHIPPING CO., ET AL.	Section "J"

This civil action is before the Court on the defendants' motion for summary judgment [Record Document No. 48].

Determing that oral argument is not needed, the Court **CANCELLED** the hearing on the motion, previously set for August 28, 1991. The Court now **GRANTS** the motion.

The Court need not determine whether the defendant's expert report shows "scientific proof" that the longshoremen's testimony (that the oil was present when they took over control of the vessel for unloading the cargo containers) is "physically impossible." Even assuming that the oil was present from the beginning and not from the stevedore's end loader, the defendants are entitled to summary judgment under *Scindia*.

DATE OF ENTRY SEP 4 1991

As the longshoremen's testimony shows, the patch of oil was plainly visible to them during the daylight hours when they were first unloading the container. In these circumstances, "*Scindia* entitles the shipowner to rely on an 'expert and experienced stevedore' acting with 'reasonable care' " would correct or warn about the hazard. *Morris v. Compagnie Maritime des Chargeurs Reunis, S.A.*, 832 F.2d 67, 71 (5th Cir. 1987). Thus, in order to hold the shipowner liable, the plaintiff must also prove that "circumstances made safer alternatives unduly impractical or time-consuming." *Ibid.* The plaintiffs have presented no such evidence, nor have they presented any evidence that the stevedore was under any special time constraint; indeed, the defendants have presented evidence that at least two safer alternatives to jumping, or stepping, across container tops existed (climbing down one container and then up the other, or using a platform or ladder between the two container tops) and that oil spills are easily cleaned up such as with sand or sawdust.

There is no basis for finding that *Scindia's* second category may apply here inasmuch as there is no evidence that the shipowner was exercising any control over either the cargo containers or the vessel cranes (or over any other portion of the ship) at any time during the stevedore's operations.

Finally, there is no basis for finding that *Scindia's* third category may apply here. Not only is there no evidence that the shipowner had actual knowledge about the oil spill on this one container at any time whatsoever, but also there is no evidence that it had actual knowledge that the stevedore would not correct the hazard and thus was acting with "obvious imprudence" toward the safety of its longshoremen.

The cases cited by the plaintiffs and the intervenor are all distinguishable: either the hazard was preexisting and hidden, *see Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161, 166-67 (5th Cir. 1990), or no reasonable alternative existed, *see id.; Gay v. Barge 266*, 915 F.2d 1007, 1011-12 (5th Cir. 1990), or the vessel owner knew about the hazard and saw the stevedore continuing to operate without correcting the hazard, *see id.; Randolph v. Laeisz*, 896 F.2d 964, 970 (5th Cir. 1990); *Hernandez v. M/V Rajaan*, 841 F.2d 582, 586 (5th Cir. 1988).

In sum, "[b]ecause the shipowner has no duty to anticipate the actions or inaction of a careless stevedore" and "easy steps [by the stevedore] ... would have avoided the obvious danger presented" either by the oil spill or by jumping or stepping across container tops, *see Morris*, 832 F.2d at 71, the defendants here cannot be held responsible for the plaintiff's fall.

- - - - -

/s/ Illegible

ph

APPENDIX C

MINUTE ENTRY
October 1, 1991
CARR, J.

FILED
OCT 1 1:50 PM '91

DONNA TILLMAN TURNER, ET AL.	CIVIL ACTION
VERSUS	NO. 90-0727
OCEAN NYMPH SHIP—	Section "J" PING CO., ET AL.

This matter is before the court on plaintiff's and intervenor's Motion for New Trial or alternatively For Relief From Judgment [Record Document No. 63]. The Court has determined in its discretions that oral argument is unnecessary. As such, the Court now **CANCELS** the hearing previously scheduled for October 2, 1991.

Upon reconsideratiion, the Court's ruling of September 3, 1991, still stands. The plaintiffs and intervenor has failed to set forth any basis for finding the defendant liable under the rational of *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed 2d 1 (1981) and *Morris v. Compagnie Maritime des Chargeurs Reunis, S.A.,* 832 F.2d 67 (5th Cir. 1987). (See Minute Entry dated September 3, 1991.) Accordingly, plaintiffs and intervenor's motions is **DENIED.**

DATE OF ENTRY OCT 01 1991

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 91-3878

U.S.DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED SEP 28 1992

U.S.COURT OF APPEALS
FILED SEP 03 1992

DONNA TILLMAN TURNER,
wife of/and CRAYTON K. TURNER,
Plaintiffs-Appellants,

and

CIGNA INSURANCE COMPANIES,
Intervenor-Plaintiff-
Appellant,

versus

OCEAN NYMPH SHIPPING CO., LTD., ET AL.,
Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Louisiana

(CA 90 727 J)

ISSUED AS MANDATE: **SEP 25 1992**

Before REAVLEY, HIGGINBOTHAM, and DUHE', Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.

Costs on appeal are to be taxed against appellants.

A true copy
Test

Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Della J. Franklin
Deputy

New Orleans, Louisiana

Sep 25 1992

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED JUL 30 1991

DONNA TILLMAN TURNER, wife of/and CRAYTON K. TURNER	§	CIVIL ACTION
	§	NO. 90-0727
VERSUS	§	
OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIPMANAGEMENT LIMITED	§	SECTION "J"
	§	MAG. DIV. (2)

MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, come Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited and respectfully move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for a summary judgment, dismissing plaintiff's claims under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, for the reasons more fully set forth in the accompanying Memorandum.

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS, TOLER & SARPY

/s/ Laurence R. Plunkett, Jr.

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1100 Poydras Street
New Orleans, Louisiana 70163
(504) 585-7000
Attorneys for Defendants, Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded to all counsel of record by placing a copy of same in the United States Mail, postage prepaid, this 30th day of July, 1991.

/s/ Lawrence R. Plunkett, Jr.

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, wife of/and CRAYTON K. TURNER	§	CIVIL ACTION
	§	NO. 90-0727
VERSUS	§	
OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIPMANAGEMENT LIMITED	§	SECTION "J"
	§	MAG. DIV. (2)

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

This action arises under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b), as a result of an accident involving longshoreman Crayton K. Turner, which occurred aboard the M/V SUCRE on 21 January 1990. Plaintiffs, Donna and Crayton Turner, brought suit against Ocean Nymph Shipping Co., Ltd. (hereinafter Ocean Nymph), the operator of the M/V SUCRE, and Columbia Shipmanagement Limited (hereinafter Columbia), the owner of the M/V SUCRE, for injuries sustained by Crayton K. Turner on 21 January 1990. The trial of this matter is scheduled to begin on 23 September 1991.

Defendants, Ocean Nymph and Columbia, now move this Honorable Court for a summary judgment, dismissing plaintiffs' claims against them. There are no genuine issues of material facts relevant to this motion and, considering the facts herein, plaintiffs' 33 U.S.C. § 905(b) claims fail because there is **no evidence of vessel negligence.** Accordingly, Ocean Nymph and Columbia are entitled to a dismissal as a matter of law.

FACTS

The M/V SUCRE is an ocean-going, general cargo vessel which was owned by Columbia in January 1990. The M/V SUCRE was designed to accomodate containerized cargo. Part of the design allows the stowage of a 20 foot container awthartship, on a four-legged pedestal, just aft of the vessel's Nos. 1 and 2 pedestal crane, and just forward of the No. 2 hold. This is known as stowage position "EP-41'." When a 20 foot container is placed on the pedestal, the container is level with the first tier of containers stowed on the top of the No. 2 hold. With containers stowed in this configuration, there is a space four feet, nine inches (4'09") between the 20 foot container stowed in position EP-41 and the containers atop the No. 2 hold. It is this space that plaintiff was trying to jump when he fell and was injured.

The M/V SUCRE arrived in New Orleans, on 21 January 1990, berthing at Poland Avenue Wharf, at 1418 hours. The vessel had previously loaded containerized cargo in Miami, Florida. The vessel's charterers arranged for Coastal Cargo Company, a New Orleans stevedore, to discharge part of the containers, load additional containers, and restow certain of the discharged containers.

Upon the vessel's arrival at Poland Avenue Wharf, Edward Stettinius, General Superintendent for Coastal Cargo Company, boarded the M/V SUCRE and inspected

the vessel prior to beginning cargo operations. (Stettinius deposition at pp. 74-75).[1] According to Stettinius, Coastal Cargo's normal procedure is for a superintendent to board and inspect a vessel prior to beginning cargo operations. However, such an inspection does not extend to inspecting the tops of containers. (Stettinius deposition at pp. 59-60). Stettinius further testified that the responsibility for identifying potentially hazardous conditions is placed on Coastal Cargo's longshoremen. If a potentially hazardous condition is discovered during operations, the longshoreman is required to notify his foreman or the superintendent. (Stettinius deposition at pp. 38, 55). If the condition exists aboard the vessel, the superintendent will notify the vessel's crew and request the crew to remedy the situation. If the situation exists on the wharf, Coastal Cargo will remedy the condition. (Stettinius deposition at p. 56). In either case, Coastal Cargo maintains equipment and supplies to clean up or otherwise remedy accumulations of oil, slippery substances and other hazards. (Stettinius deposition at p. 52). On this particular occasion, Stettinius boarded and inspected the M/V SUCRE, and satisfied himself that Coastal Cargo could carry out its discharge operations without any problem. (Stettinius deposition at pp. 79, 84). During the entire cargo operations, there were no complaints regarding vessel conditions made either to a Coastal Cargo superintendent, or the vesssel's crew. (Stettinius deposition at pp. 137-138, 166-167, 169). Specifically, no complaints were made regarding any oil or foreign substance on the container tops. (Stettinius deposition at p. 156-157; Booker deposition at p. 34; Falgoust deposition at p. 26).

Discharge operations began at 1430 hours on 21 January 1990. As indicated above, certain containers were

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[1] Stettinius testified as the corporate representative of Coastal Cargo at the 30(b)(6) deposition of Coastal Cargo.

discharged from the M/V SUCRE, and set aside to be restowed aboard the vessel at a later time. One of the containers designated for restow was Container No. INNU 2109086 (hereinafter designated "the 20 foot container"). On the voyage from Miami to New Orleans, this container was stowed in Bay 5, Space 82.04. This means the container was stowed on top of the No. 2 hold, third container from the port side and was the only container in the tier. This container was discharged sometime prior to the evening meal break at 1800 hours on 21 January 1990 (Harang deposition at p. 27), and restowed between 2150 hours and 2320 hours. (Stettinius deposition at p. 135). This container was restowed in the EP-41 position.

Discharge was uneventful until 2320 hours when plaintiff attempted to jump the four foot nine inch (4'09") space between "the 20 foot container" stowed in the EP-41 position and the row of containers atop the No. 2 hold. Plaintiff fell between the wharf and the vessel, eventually landing on a piling below the wharf. He was thereafter evacuated to Charity Hospital for treatment.

Defendants submit the sole cause of plaintiff's accident was his own negligence, in jumping between container tops, a known unsafe practice. (Booker deposition at p. 43; Falgoust deposition at p. 33; Stettinius deposition at p. 39-44). Plaintiff's own testimony is that he considered it unsafe to jump a distance greater than four feet, even though he had done so in the past. (C.Turner deposition at pp. 63-64).[2] Here, plaintiff was attempting to jump four feet nine inches (4'09"). Plaintiff testified the proper method of getting from the top of one container to another, when a distance of four feet or more separated the two containers was to climb down a ladder from the first container,

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[2] Plaintiff later changed his testimony saying he would consider it unsafe to jump a distance greater than 3 1/2 feet. (C.Turner deposition at pp. 65-67).

and up the ladder to the second container. (C.Turner deposition at p. 63). The other longshoremen agree that the safest method of moving from container top to container top is to climb down and then climb back up. (Falgoust deposition at pp. 21-22; Harang deposition at p. 30). Coastal Cargo General Superintendent Stettinius also testified that climbing down and back up was one of the approved means to move from container to container. (Stettinius deposition at pp. 39-40).[3]

There was no reason for plaintiff to be in any hurry to move from "the 20 foot container" at position EP-41 to the other row of containers atop the No. 2 hold, because no cargo operations were underway while the vessel's crane was being rerigged to accommodate a different size container. (Booker deposition at p. 15; Falgoust deposition at p. 18; Harang deposition at p. 14; Stettinius deposition at p. 134). There was absolutely no reason that plaintiff could not have utilized one of the approved methods for moving from container top to container top.

The uncontroverted evidence is that plaintiff routinely disregarded his employer's safety rules and jumped between containers, (C. Turner deposition at p. 62-65; Booker deposition at pp. 43-44; Falgoust deposition at p. 20; Harang deposition at pp. 30-31; Stettinius deposition at p. 47) even after being told by Coastal Cargo supervisors not to jump. (Booker deposition at pp. 43-45). Defendants submit that regardless of the condition of "the 20 foot container" top, the sole cause of plaintiff's accident was his intentional disregard of safety rules and disregard for his own safety.

Plaintiff, however, contends that it was not jumping

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[3] The other approved method is to lay a ladder across the gap and crawl across.

from container to container that caused his injury, but rather oil on the top of the container which caused him to slip. Defendants submit that even if the oil on top of the container played some role in plaintiff's fall, defendants still bear no responsibility for the accident. While plaintiff contends the oil originated from the vessel's Nos. 1 and 2 pedestal cranes, defendants, submit the uncontroverted scientific analysis of oil samples from "the 20 foot container," the vessel's Nos. 1 and 2 pedestal cranes, and Coastal Cargo's Calmar top end loader (hereinafter "top end loader") proves the source of the container top oil was *not* the vessel's cranes, but rather, Coastal Cargo's top end loader.

Plaintiff claims that because he suffered a head injury in the fall, his own recollection of the facts of the incident are very confused. (C.Turner deposition at pp. 92-99). Plaintiff's recollection regarding the day of his accident are confused due to "visions" of his accident he claims to suffer. Plaintiff is unable to differentiate what he actually remembers happening and what he "sees" happening in his "visions." Therefore, the testimony of the other longshoremen witnesses becomes very important. The other longshoremen all testified that there was oil on top of "the 20 foot container," and no other containers, when "the 20 foot container" was originally discharged. (Booker deposition at pp. 29, 38-39; Falgoust deposition at p. 25; Harang deposition at p. 21). The oil on top of "the 20 foot container" was easily seen. (Booker deposition at p. 29; Falgoust deposition at pp. 35-36; Harang deposition at p. 44).

Even though the longshoremen allege they saw the oil prior to the initial discharge, they did not report it to the superintendent. (Booker deposition at p. 34; Falgoust deposition at p. 26; Stettinius deposition at pp. 137-138).

According to Coastal Cargo policy, the oil should have been reported by the longshoremen. (Stettinius deposition at pp. 156-157).

Defendants submit that the scientific evidence in this case will disprove the longshoremen's version of the facts. The day after plaintiff's accident, defendants obtained samples of the oil from the top of "the 20 foot container," the vessel's Nos. 1 and 2 pedestal crane, and the top end loader, owned and operated by Coastal Cargo. Later a second sample was obtained from the top end loader. The results of the scientific analysis by Spectrochem of the samples show conclusively that the oil on "the 20 foot container" came from the top end loader and not the vessel's crane. Both specimens from the top end loader are similar to the sample from "the 20 foot container,"while the sample from the vessel's crane is different. (See report of Spectrochem, attached hereto as Exhibit "A".)

Thus, the oil could not have been on "the 20 foot container' until after the container was discharged initially by Coastal Cargo. Defendants submit that oil leaked onto the top of "the 20 foot container" either when it was moved on the wharf by Coastal Cargo's top end loader, or when the top end loader's spreader bars were parked over "the 20 foot container" while located on the wharf. Coastal Cargo's top end loader constantly leaks oil and needs repairs to its hydraulic system, (Stettinius deposition at p. 114; Booker deposition at p. 39), and has in fact leaked oil onto container tops in the past. (Booker deposition at p. 41). The top end loader is occasionally used to move 20 foot containers, (Booker deposition at p. 50), and it is occasionally left with its spreader bars parked over containers. (Stettinius deposition at pp. 119-120). Thus, defendant maintains the oil leaked from the Coastal Cargo top end loader after "the

20 foot container" had been discharged and before it was reloaded onto the vessel.

Defendants submit that there are three possible factual scenarios for when the oil was first present on "the 20 foot container": Scenario 1, that the oil was present prior to Coastal Cargo beginning its operations; Scenario 2, that the oil accumulated after initial discharge, but prior to being restowed and originated from the top end loader; and, Scenario 3, that the oil was not present at the time the vessel was inspected, but accumulated during cargo operations and originated from the vessel's gear.[4] Defendants are entitled to Summary Judgment as a matter of law under any and all of the three scenarios.

ARGUMENT

Defendants, Ocean Nymph and Columbia, maintain there is no vessel negligence under any of the factual scenarios presented in this case and, accordingly, they are entitled to summary judgment, dismissing plaintiffs' claims as a matter of law.

There is no question that plaintiff is a covered employee under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* Under § 905(b) of the Act, plaintiff solely has a cause of action against the vessel for injuries sustained as a result of the vessel's negligence.

The section of the Act, in pertinent part, provides:

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[4] Defendants submit that Scenario No. 3 is highly unlikely, given the uncontroverted scientific evidence in this case, but, nevertheless, defendants will analyze it as a possibility for the sake of completeness.

If such person was employed by the vessel to provide stevedoring services, **no such action shall be permitted, if the action was caused by the negligence of persons engaged in...**

APPENDIX G

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, wife of/and CRAYTON K. TURNER	§	CIVIL ACTION
	§	NO. 90-0727
VERSUS	§	
OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIPMANAGEMENT LIMITED	§	SECTION "J"
	§	MAG. DIV. (2)

UNCONTESTED MATERIAL FACTS

NOW INTO COURT, through undersigned counsel, come defendants Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited, and solely for the purposes of the accompanying Motion for Summary Judgment, and pursuant to Local Rule 2.09, submits the following Statement of Uncontested Material Facts.

1. The M/V SUCRE was a general cargo vessel owned by Columbia Shipmanagement Limited and operated by Ocean Nymph Shipping Co., Ltd. on 21 January 1990.

2. Coastal Cargo Company contracted with the charterers of the M/V SUCRE to provide stevedoring services to the M/V SUCRE at the Poland Avenue Wharf during January 1990.

3. Crayton K. Turner was employed by Coastal Cargo Company as a longshoreman.

4. Crayton K. Turner was assigned by Coastal Cargo Company to act as a longshoreman during cargo operations aboard the M/V SUCRE.

5. Edward Stettinius, General Superintendent at Coastal Cargo Company, acted as superintendent during cargo operations conducted aboard the M/V SUCRE on 21 January 1990 and 22 January 1990. (Stettinius deposition at pp. 74-75).

6. Edward Stettinius, as acting superintendent, inspected the M/V SUCRE prior to Coastal Cargo beginning cargo operations. (Stettinius deposition at pp. 74-75).

7. Coastal Cargo's pre-cargo operations inspection policy does not require inspection of the tops of containers aboard vessels. (Stettinius deposition at pp. 59-60).

8. Edward Stettinius, an acting superintendent, satisfied himself following inspection of the M/V SUCRE that Coastal Cargo could conduct cargo operations with reasonable safety. (Stettinius deposition at pp. 79, 84).

9. Neither Coastal Cargo nor any of its employees made any complaints to the crew of the M/V SUCRE regarding the conditiion of the vessel or its gear during cargo operations conducted on 21 January 1990. (Stettinius deposition at pp. 137-138, 166-167, 169).

10. Neither Coastal Cargo nor its employees made any complaints to the crew of the M/V SUCRE regarding oil on the tops of any containers. (Stettinius deposition at pp. 156-157; Booker deposition at p. 34; Falgoust deposition at p. 26).

11. Plaintiff fell while jumping *from* a 20 foot container located at stowage position EP-41 to the first tier of containers located above the No. 2 hold.

12. The oil on top of the container located at stowage position EP-41 was easily seen by all longshoremen. (Booker deposition at p. 29; Falgoust deposition at pp. 35-36; Harang deposition at p. 44).

13. The Coastal Cargo longshoremen took no affirmative action to either report the oil on top of the containers or to remedy the only condition. (Booker deposition at p. 34; Falgoust deposition at p. 26; Stettinius deposition at pp. 137-138).

14. Coastal Cargo Company's policy requires that longshoremen report any hazardous conditions to their superintendent. (Stettinius deposition at pp. 38, 55, 156-157).

15. Coastal Cargo maintains equipment and supplies to clean up, or otherwise remedy accumulations of oil or other slippery hazards. (Stettinius deposition at p. 52).

16. Plaintiff considered it to be unsafe to jump between containers if the distance exceeded 3 1/2 to 4 feet. (C.Turner deposition at pp. 63-64, 64-67).

17. Plaintiff had previously been warned not to jump

from container to container. (Booker deposition at pp. 43-45).

18. No cargo operations were proceeding at the time of plaintiff's accident. (Booker deposition at p. 15; Falgoust deposition at p. 18; Harang deposition at p. 14; Stettinius deposition at p. 134).

19. The oil on top of "the 20 foot container" did not come from the vessel's Nos. 1 and 2 pedestal cranes.

20. The oil on top of "the 20 foot container" came from Calmor top end loader, owned and operated by Coastal Cargo.

21. Coastal Cargo's policy is that jumping from container top to container top is an unsafe act. (Stettinius deposition at pp. 39-44; Booker deposition at pp. 43-45).

22. Coastal Cargo's policy is that the safe method of moving from container top to container top is to climb down a ladder and then climb back up or to lay a ladder down between the containers and crawl across. (Stettinius deposition at pp. 39-40).

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS, TOLER & SARPY

/s/ Lawrence R. Plunkett, Jr.

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Attorneys for Defendants, Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded to all counsel of record by placing a copy of same in the United States Mail, postage prepaid, this 30th day of July, 1991.

/s/ Lawrence R. Plunkett, Jr.

APPENDIX H

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Aug 20, 1991

DONNA TILLMAN TURNER, wife of/and CRAYTON K. TURNER	CIVIL ACTION
	NO. 90-0727
VERSUS	
OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIPMANAGEMENT	SECTION "J"
	Judge Carr Magistrate Wynne

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

MAY IT PLEASE THE COURT:

This claim arises out of a January 21, 1990 accident in which plaintiff, Crayton Turner, slipped and fell from a container aboard the defendant's vessel, the M/V SUCRE, while it was docked in the Port of New Orleans. When plaintiff slipped, he fell approximately fifty feet, landing on his head on the concrete piers of the dock. He was unconscious for approximately three months and suffers from residual deafness in one ear, partial paralysis in one leg, partial paralysis in one arm, and brain damage which affects his memory, intelligence, and personality. Plaintiff alleges that he slipped from the M/V SUCRE in oil located

on top of a twenty foot container located on that vessel just beneath one of the vessel's cranes. Plaintiff further alleges that this ship's crane leaked oil (Stettinius deposition, pages 81 and 82); and that the oil was on the container when the M/V SUCRE arrived in the Port of New Orleans (Falgoust deposition, page 25; Booker deposition, page 29; Harang deposition, page 21). Plaintiff contends that the existence of oil on top of a container in an area where the vessel knew stevedores would have to work is a breach of the vessel's duty owned to stevedores to provide a reasonably safe place to work. Plaintiff further contends that this defect was hidden in that it was located on the top of a container which had other containers located on top of it and that the vessel failed to warn plaintiff and his fellow stevedores of this defect. Plaintiff further contends that this is a hazard under the control of the ship, in that the ship's own crane created the hazard. Lastly, plaintiff contends that the M/V SUCRE had knowledge of the oily container top (or was charged with such knowledge) and that it further had knowledge that stevedoring operations with regard to this container were nevertheless being conducted by plaintiff's employer and that the vessel should have intervened.

As will appear from plaintiff's response to the defendant's statement of allegedly uncontested material facts, most of the facts material to this case are contested by the parties. The defendants' motion should therefore be denied on that basis. Additionally, plaintiff submits that the law does not support the granting of defendants' motion.

The party seeking Summary Judgment bears the initial burden of demonstrating that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 US 317 (1986). Here, the defendant claims that the oily substance on which plaintiff slipped came from a dock side source. Plaintiff and all of his co-workers claim that the oily

substance was on the container in question when the M/V SUCRE arrived in the Port of New Orleans.

The United States Supreme Court has held that, before turning over the vessel to a stevedore, a shipowner must exercise due care to insure that the ship and its equipment are in such a condition that an experienced stevedore will be able by the exercise of reasonable care to carry on its operations with reasonable safety to persons and property. Even after stevedoring operations have begun, the vessel owner has a duty to intervene in the stevedore's operations when he has actual knowledge both of a hazardous condition and that the stevedore, in the exercise of obviously improvident judgment, intends to continue work in spite of that condition. *Scindia Steam Navigation Co. v. de los Santos,* 451 US 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981).

"Vessel owner liability may arise: (1) if the vessel owner fails to warn on turning over the ship of hidden defects of which he should have known; or (2) for injury caused by hazards under the control of the ship; or (3) if the vessel owner fails to intervene in the stevedore's operations when he has actual knowledge both of the hazard and that the stevedore, in the exercise of obviously improvident judgment, means to work on in the face of it and therefore cannot be relied on to remedy it." *Masinter v. Tenneco Oil Co.,* 867 F.2d 892 (5th Cir., 1989) The obviousness of a danger, although relevant to the first exception listed above, bears no significance to a vessel owner's duty caused by hazards under the control of the ship, which is exception no. 2, above. *Masinter,* Supra.

A shipowner has no defense that a hazard was open and obvious. *Stassi v. American Commercial Lines, Inc.,* 720 F.2d 879 (5th Cir., 1983); 56 Tul. L. Rev. 1421 (1982);

Treadaway v. Societie Anonyme Louis-Dreyfus, 894 F.2d 161 (5th Cir., 1990).

Maintenance and repair of a ship's winch (or crane) is the sole responsibility of the ship's crew. Where a longshoreman is injured as a result of defective ship's equipment, a reasonable jury could find that the ship should stop loading operations until the winch (or crane) could be made safe. There are circumstances in which a shipowner has a duty to act where the danger to longshoremen arises from malfunctioning of the ship's gear being used in cargo operations. *Viator v. Hellenic Lines,* 558 F. Supp. 700 (E.D. TX. 1983).

Where water and oil existed in a work area when the longshoremen first board a vessel, a jury may find that a vessel owner breached its duty that it owed to the longshoremen to provide a reasonably safe place to work even if the accumulation of water and oil was visible and thus known to the longshoremen. *Treadaway,* Supra.

If a condition exists from the outset, the shipowner is charged with actual knowledge of the dangerous condition. *Hernandez v. M/V RAJAAN,* 841 F. 2d 852 (5th Cir., 1988). Where a vessel owner, through its actions and failures to act, sets the stage for an accident, even if that event required the negligence of a stevedore to appear on the scene before it could occur, the allocation of the stevedore's fault to the vessel owner is reasonable. *Woods v. Sammisa Co., Ltd.,* 873 F.2d 842 (5th Cir., 1989).

Even if a stevedore or its employees were negligent *and* that negligence was a proximate cause of the plaintiff's injury, only if a reasonable jury could reach no other conclusion but that the stevedore's negligence was the *sole* cause of the injury, should Summary Judgment be granted

in favor of the vessel owner. *Gay v. Barge 266*, 915 F.2d 1007 (5th Cir., 1990).

Here, there are many facts in dispute. For this, and the aforementioned reasons, plaintiffs submit that the defendants' motion should be denied.

Respectfully submitted,

/s/ Harold M. Wheelahan, III
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FAX NO. 525-6587

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to all counsel of record by placing a copy of same in the United States mail, postage prepaid, addressed to the offices of said attorney(s) this 20 day of Aug., 1991.

/s/ Harold M. Wheelahan, III
Harold M. Wheelahan, III

APPENDIX I

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, wife of/and CRAYTON K. TURNER	CIVIL ACTION
	NO. 90-0727
VERSUS	
OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIPMANAGEMENT	SECTION "J"
	Judge Carr Magistrate Wynne

* * * * * * * * * * * *

PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF ALLEGEDLY UNCONTESTED MATERIAL FACTS

NOW INTO COURT, through undersigned counsel, come plaintiffs, Donna Tillman Turner, wife of/and Crayton Turner, who respond to the Statement of Allegedly Uncontested Material Facts submitted by defendants, Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagment, Ltd., as follows:

I.

Plaintiffs admit the allegations of Paragraph I.

II.

Plaintiffs admit the allegations of Paragraph II.

III.

Plaintiffs admit the allegations of Paragraph III.

IV.

Plaintiffs admit the allegations of Paragraph IV.

V.

Plaintiffs admit the allegations of Paragraph V.

VI.

Plaintiffs specifically deny that Edward Stettinius inspected the M/V SUCRE prior to Coastal Cargo beginning cargo operations. In his deposition, Mr. Stettinius testified: "Question: What did you do aboard the vessel? Answer: I got stowage informage with the port captain and the chief mate and proceeded to discharge the vessel." (Page 74)

VII.

The allegations of Paragraph VII are admitted insofar as they state that Coastal Cargo's pre-cargo operations inspected policy does not require inspection of the tops of containers aboard the vessels. Stettinius testified "you have containers stacked on top of one another and its not possible in those cases." (Page 60).

VIII.

The allegations of Paragraph VIII are denied as stated, because Stettinius testified that it was impossible to inspect parts of the vessel that the Coastal Crew would need to deal with such as the tops of containers that had other containers stacked on top of them. (Page 60).

IX.

The allegations in Paragraph IX are denied as stated. It is admitted that Stettinius did not make a complaint to the crew of the M/V SUCRE regarding the condition of the vessel or its gear on 21 January 1990.

X.

The allegations of Paragraph X are denied as stated. It is admitted that Stettinius made no complaint to the crew of the M/V SUCRE regarding oil on the tops of any containers until the day after the accident. (Stettinius deposition, at pages 155 and 156).

XI.

The allegations of Paragraph XI are denied insofar as they categorize plaintiff's steping from one container to another as a jump". It is not nexessary to jump from one container to another. (Harang deposition, page 29; Crayton Turner deposition, pages 63 and 64.)

XII.

It is admitted that both Falgoust and Harang have testified that they could easily see what was variously categorized as "oil" or "grease" on top of the container.

Falgoust and Harang both testified that they dealt with this container during the day time. Whether other longshoremen could see the slippery substance on the container later that night at the time of Turner's accident is purely speculative. The allegations of Paragraph XII are therefore denied.

XIII.

The allegations of Paragraph XIII are denied as written. It is admitted that Booker and Falgoust noticed the oily substance during day light hours and spoke to their immediate co-workers about it. All other allegations of Paragraph XIII are denied. (Falgoust deposition, page 28).

XIV.

The allegations of Paragraph XIV are denied as stated. The Coastal Cargo workers were unaware of any such policy.

XV.

The allegations of Paragraph XV are denied as written. It is admitted that sawdust is kept in the warehouse which is sometimes spread on slippery substances.

XVI.

The allegations of Paragraph XVI are denied as written. The context of the plaintiff's testimony is that if he could step between containers he felt it was safe. He did not feel it was safe to jump between containers. It was not necessary to jump from number 2 to the forty footers. (Harang deposition, page 29).

XVII.

The allegations of Paragraph XVII are denied. Recorded testimony simply states that Booker, a Coastal worker, had been warned not to jump from container to container.

XVIII.

The allegations of Paragraph XVIII are denied. The quoted testimony is that the crew was re-rigging the ship's crane to load different types of containers.

XIV.

The allegations of Paragraph XIV are denied. The M/V SUCRE's cranes consistently leaked oil and the twenty foot container in question was stowed right below the crane. (Deposition, Edward Stettinius, pages 81 and 82).

XX.

The allegations of Paragraph XX are denied. The top end loader was not used to load the twenty foot container and therefore could not have leaked oil on the twenty foot container. (Harang deposition, page 28).

XXI.

The allegations of Paragraph XXI are denied as written in that Coastal Cargo's policy and its means of dissemination are in dispute. (Harang deposition, page 31).

XXII.

The allegations of Paragraph XXII are denied in that

at least some of the Coastal employees had never been told that this was company policy. (Falgoust deposition, page 22).

Respectfully submitted,

/s/ Harold M. Wheelahan, III

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504-566-1666
FAX NO. 525-6587

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to all counsel of record by placing a copy of same in the United States mail, postage prepaid, addressed to the offices of said attorney(s) this 20 day of Aug., 1991.

/s/ Harold M. Wheelahan, III

Harold M. Wheelahan, III

APPENDIX J

VERBATIM TEST OF 33 U.S.C.A. 905(b)

"NEGLIGENCE OF VESSEL:

In the event of injury of a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages be reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide ship building, repairing or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

Supreme Court, U.S.
FILED
DEC 23 1992
OFFICE OF THE CLERK

(2)

NO. 92-1027

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CRAYTON K. TURNER AND
DONNA TILLMAN TURNER,
Plaintiffs-Applicants

AND

CIGNA INSURANCE COMPANIES,
Respondent

Versus

OCEAN NYMPH SHIPPING CO., LTD.
AND COLUMBIA SHIP MANAGEMENT, LTD.,
Defendants-Respondents

BRIEF OF RESPONDENT CIGNA INSURANCE COMPANIES TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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76 pp

QUESTION PRESENTED FOR REVIEW

Respondent, CIGNA Insurance Companies, adopts by reference the Questions Presented for Review set forth in the Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit filed by Crayton K. Turner and Donna Tillman Turner, plaintiffs-applicants, on December 1, 1992.

LIST OF PARTIES

1. Crayton K. Turner, applicant.
2. Donna Tillman Turner, applicant.
3. Harold M. Wheelahan, III and Dawn Adams Wheelahan, attorneys for plaintiffs-applicants.
4. Coastal Cargo, Inc., applicant's employer.
5. CIGNA Insurance Companies, intervenor-applicant.
6. Peter L. Hilbert, Jr., Kathleen K. Charvet, and McGlinchey Stafford Lang, a Law Corporation, attorneys for CIGNA Insurance Companies.

7. Ocean Nymph Shipping Co., Ltd., defendant-respondent.

8. Columbia Shipmanagement, Ltd., defendant-respondent.

9. Robert H. Murphy, and the law firm of Murphy, Williams, Rogers & Sloss, counsel for respondents.

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TABLE OF AUTHORITIES

Respondent, CIGNA Insurance Companies, adopts the Authorities set forth in the Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit filed by the plaintiffs-applicants, Crayton K. Turner and Donna Tillman Turner, which appears at page v thereof.

NO. 92-1027

IN THE

SUPREME COURT OF THE UNITED STATES

CRAYTON K. TURNER AND
DONNA TILLMAN TURNER,
Plaintiffs-Applicants

AND

CIGNA INSURANCE COMPANIES,
Respondent

Versus

OCEAN NYMPH SHIPPING CO., LTD.
AND COLUMBIA SHIP MANAGEMENT, LTD.,
Defendants-Respondents

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

RESPONSE OF CIGNA INSURANCE COMPANIES TO PETITION FOR WRIT OF CERTIORARI

REFERENCE TO OPINIONS

Respondent, CIGNA Insurance Companies, respectfully prays that a Writ of Certiorari issue to review the following judgments and opinions:

1. Judgment dated September 3, 1992 granting defendants' Motion for Summary Judgment and dismissing plaintiffs' and intervenor's claims with prejudice;

2. Minute Entry dated September 3, 1992, giving reasons for judgment;

3. Minute Entry dated October 1, 1991 denying plaintiffs' and intervenor's Motion for a New Trial or, Alternatively, for Relief from Judgment; and

4. The September 3, 1992 opinion by the United States Court of Appeals, Fifth Circuit.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The judgment to be reviewed is an opinion by the United States Court of Appeals, Fifth Circuit, rendered September 3, 1992.

2. This Court has jurisdiction pursuant to 28 U.S.C. §1254. This Petition is timely filed pursuant to Rule 12.3 of the Rules of the Supreme Court of the United States.

STATUTES INVOLVED

Respondent, CIGNA Insurance Companies, hereby adopts by reference the "Statutes Involved" portion of the Petition for Writ of Certiorari filed by plaintiffs-applicants, Crayton K. Turner and Donna Tillman Turner, appearing at page 2 thereof.

STATEMENT OF THE CASE

(1) Nature of the case and course of proceedings and disposition below.

The original Complaint for Damages of the plaintiffs, Crayton K. Turner and Donna Tillman Turner, was filed in the United States District Court for the Eastern District of Louisiana on February 28, 1990. CIGNA Insurance Companies filed its Petition for Intervention on June 5, 1990 in order to assert its lien for workers' compensation benefits and medical benefits paid to or on behalf of Crayton K. Turner.

The owners and operators of the M/V SUCRE, Ocean Nymph Shipping Company, Ltd. and Columbia Shipmanagement, Ltd. ("the vessel")

filed a Motion for Summary Judgment claiming that no genuine issues of material fact existed and that the plaintiffs' claim pursuant to Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et. seq., must fail because no evidence of vessel negligence existed. Plaintiffs responded, contending that multiple disputed issues of material fact exist and that the Motion for Summary Judgment should be denied. Intervenor also filed an opposition to the vessel's motion. The Trial Court granted the vessel's motion dismissing both the plaintiffs' and the intervenor's claims with prejudice. Plaintiffs and Intervenor appealed the Trial

Court's ruling to the United States Court of Appeals for the Fifth Circuit. That Court affirmed the Trial Court.

(2) Statement of Facts.

Respondent, CIGNA Insurance Companies, hereby adopts by reference the "Statement of Facts" of the Petition for Writ of Certiorari filed by plaintiffs-applicants, Crayton K. Turner and Donna Tillman Turner, appearing at pages 3-4 thereof.

ARGUMENT

Respondent, CIGNA Insurance Companies, hereby adopts by reference the "Argument" of the Petition for Writ of Certiorari filed by plaintiffs-applicants, Crayton K. Turner and Donna Tillman

Turner, appearing at pages 5-11 thereof.

CONCLUSION

Respondent, CIGNA Insurance Companies, files this Petition for Writ of Certiorari to preserve its right of recovery of compensation benefits and medical benefits paid by CIGNA Insurance Companies pursuant to the provisions of the LHWCA to or on behalf of plaintiffs-applicants, Crayton K. Turner and Donna Tillman Turner, as a result of the injuries sustained by Crayton K. Turner on January 21, 1990 aboard the M/V SUCRE.

Respectfully submitted,

PETER L. HILBERT, JR.
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Attorneys for CIGNA
Insurance Companies,
Respondent

PROOF OF SERVICE

I, Peter L. Hilbert, Jr., attorney for Respondent, and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing Brief of Respondent on:

Mr. Harold M. Wheelahan, III
Ms. Dawn A. Wheelahan
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Attorneys for Defendant-Respondent

by mailing three copies thereof, postage prepaid and addressed to

their respective offices, this 23rd day of December, 1992.

PETER L. HILBERT, JR.

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, ET AL — CIVIL ACTION

VERSUS — NO. 90-0727

OCEAN NYMPH SHIPPING CO., ET AL — SECTION "J"

JUDGMENT

Considering the Court's Minute Entry of September 3, 1991,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that there is judgment against the plaintiffs (Donna Tillman Turner and Crayton K. Turner) and in favor of the defendants (Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited), dismissed the plaintiffs' complaint with prejudice at the plaintiffs' costs.

IT IS HEREBY FURTHER, ADJUDGED, ORDERED, AND DECREED that there is judgment against the intervenor (CIGNA Insurance Companies) and in favor of the plaintiffs and the defendants, dismissing the intervenor's petition with prejudice at its costs.

New Orleans, Louisiana, this 3rd day of September, 1991.

/s/ PATRICK E. CARR
UNITED STATES DISTRICT COURT

DATE OF ENTRY SEPTEMBER 4, 1991

APPENDIX B

MINUTE ENTRY
September 3, 1991
CARR, J.

DONNA TILLMAN TURNER, ET AL — CIVIL ACTION

VERSUS — NO. 90-0727

OCEAN NYMPH SHIPPING CO., ET AL — SECTION "J"

This civil action is before the Court on the defendants' motion for summary judgment [Record Document No. 48].

Determining that oral argument is not needed, the Court **CANCELED** the hearing on the motion, previously set for August 28, 1991. The Court now **GRANTS** the motion.

The Court need not determine whether the defendant's expert report shows "scientific proof" that the longshoremen's testimony (that the oil was present when they took over control of the vessel for unloading the cargo containers) is "physically impossible." Even assuming that the oil was present from the beginning and not from the stevedore's end loader, the defendants are entitled to summary judgment under Scindia.

DATE OF ENTRY SEPTEMBER 4, 1991

As the longshoremen's testimony shows, the patch of oil was plainly visible to them during the daylight hours when they were first unloading the container. In these circumstances, "Scindia entitles the shipowner to rely on an 'expert and experience stevedore' acting with 'reasonable care'" would correct or warn about the hazard.

Morris v. Compagnie Maritime des Chargeurs Reunis, S.A., 832 F.2d 67, 71 (5th Cir. 1987). Thus, in order to hold the shipowner liable, the plaintiff must also prove that "circumstances made safer alternatives unduly impractical or time-consuming." Ibid. The plaintiffs have presented no such evidence, nor have they presented any evidence that the stevedore was under any special time constraint; indeed, the defendants have presented evidence that at least two safer alternatives to jumping, or stepping, across container tops existed (climbing down one container and then up the other, or using a platform or ladder between the two container tops) and that oil spills are easily cleaned up such as with sand or sawdust.

There is no basis for finding that Scindia's second category may apply here inasmuch as there is no evidence that the shipowner was exercising any control over either the cargo containers or the vessel

cranes (or over any other portion of the ship) at any time during the stevedore's operations.

Finally, there is no basis for finding that Scindia's third category may apply here. Not only is there no evidence that the shipowner had actual knowledge about the oil spill on this one container at any time whatsoever, but also there is no evidence that it had actual knowledge that the stevedore would not correct the hazard and thus was acting with "obvious imprudence" toward the safety of its longshoremen.

The cases cited by the plaintiffs and the intervenor are all distinguishable: either the hazard was preexisting and hidden, see Treadaway v. Societe Anonyme Louis-Dreyfus, 894 F.2d 161, 166-67 (5th Cir. 1990), or no reasonable alternative existed, see id.; Gay v. Barge 266, 915 F.2d 1007, 1011-12 (5th Cir. 1990), or the vessel owner knew about the hazard and saw the stevedore continuing to operate without correcting the hazard, see id.; Randolph v. Laeisz, 896 F.2d 964, 970 (5th Cir. 1990); Hernandez v. M/V Rajaan, 841 F.2d 582, 586 (5th Cir. 1988).

In sum, "[b]ecause the shipowner has no duty to anticipate the actions or inaction of a careless stevedore" and "east steps [by the stevedore] . . . would have

avoided the obvious danger presented" either by the oil spill or by jumping or stepping across container tops, see Morris, 832 F.2d at 71, the defendants here cannot be held responsible for the plaintiff's fall.

/s/ Illegible

APPENDIX C

MINUTE ENTRY
October 1, 1991
CARR, J.

DONNA TILLMAN TURNER, ET AL	CIVIL ACTION
VERSUS	NO. 90-0727
OCEAN NYMPH SHIPPING CO., ET AL	SECTION "J"

This matter is before the court on plaintiff's and intervenor's Motion for New Trial or alternatively For Relief From Judgment [Record Document No. 63]. The Court has determined in its discretion that oral argument is unnecessary. As such, the Court now **CANCELS** the hearing previously scheduled for October 2, 1991.

Upon reconsideration, the Court's ruling of September 3, 1991, still stands. The plaintiffs and intervenor has failed to set forth any basis for finding the defendant liable under the rational of Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed 2d 1 (1981) and Morris v. Compagnie Maritime des Chargeurs Reunis, S.A>, 832 F.2d 67 (5th Cir. 1987). (See Minute Entry dated September 3, 1991.) Accordingly,

plaintiffs and intervenor's motion is **DENIED.**

DATE OF ENTRY OCTOBER 01, 1991

APPENDIX D

IN THE UNITED STATES
COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3878

DONNA TILLMAN TURNER,
wife of/and CRAYTON K. TURNER
Plaintiffs-Appellants,

and

CIGNA INSURANCE COMPANIES,
Intervenor-Plaintiff-
Appellant,

versus

OCEAN NYMPH SHIPPING CO., LTD., ET AL
Defendants-Appellees

Appeals from the United States
District Court for the Eastern
District of Louisiana

(CA 90 727 J)

Before REAVLEY, HIGGINBOTHAM, and DUHE, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, WIFE OF/AND CRAYTON K. TURNER	CIVIL ACTION NO. 90-0727
VERSUS	SECTION "J"
OCEAN NYMPH SHIPPING CO., LTD. AND COLUMBIA SHIPMANAGEMENT LIMITED	

MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, come Ocean Nymph Shipping Co. Ltd. and Columbia Shipmanagement Limited and respectfully move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for a summary judgment, dismissing plaintiff's claims under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq., for the reasons more fully set forth in the accompanying Memorandum.

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

/s/ LAWRENCE R. PLUNKETT, JR.

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and Columbia Shipmanagement
Limited

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded to all counsel of record b y placing a copy of same in the United States Mail, postage prepaid, this 30th day of July, 1991.

/s/ LAWRENCE R. PLUNKETT, JR.

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, WIFE OF/AND CRAYTON K. TURNER	CIVIL ACTION
	NO. 90-0727
	SECTION "J"
VERSUS	
OCEAN NYMPH SHIPPING CO., LTD. AND COLUMBIA SHIPMANAGEMENT LIMITED	MAG. DIV. (2)

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

This action arises under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA, 33 U.S.C. §905(b), as a result of an accident involving longshoreman Crayton K. Turner, which occurred aboard the M/V SUCRE on 21 January 1990. Plaintiffs, Donna and Crayton Turner, brought suit against Ocean Nymph Shipping Co., Ltd. (hereinafter Ocean Nymph), the operator of the M/V SUCRE, and Columbia Shipmanagement Limited (hereinafter Columbia), the owner of the M/V SUCRE, for injuries sustained by Crayton K. Turner on 21 January 1990. The trial of this

matter is scheduled to begin on 23 September 1991.

Defendants, Ocean Nymph and Columbia, now move this Honorable Court for a summary judgment, dismissing plaintiffs' claims against them. There are no genuine issues of material facts relevant to this motion and, considering the facts herein, plaintiffs' 33 U.S.C. §905(b) claims fail because there is no evidence of vessel negligence. Accordingly, Ocean Nymph and Columbia are entitled to a dismissal as a matter of law.

FACTS

The M/V SUCRE is an ocean-going, general cargo vessel which was owned by Columbia in January 1990. The M/V SUCRE was designed to accommodate containerized cargo. Part of the design allows the stowage of a 20 foot container awthartship, on a four-legged pedestal, just aft of the vessel's Nos. 1 and 2 pedestal crane, and just forward of the No. 2 hold. This is known as stowage position "EP-41". When a 20 foot container is placed on the pedestal, the container is level with the first tier of containers stowed on the top of the No. 2 hold. With containers stowed in this configuration, there is a space four feet, nine inches (4'09") between the 20 foot container stowed in position EP-41 and the containers atop the No. 2

hold. It is this space that plaintiff was trying to jump when he fell and was injured.

The M/V SUCRE arrived in New Orleans on 21 January 1990, berthing at Poland Avenue Wharf, at 1418 hours. The vessel had previously loaded containerized cargo in Miami, Florida. The vessel's charterers arranged for Coastal Cargo Company, a New Orleans stevedore, to discharge part of the containers, load additional containers, and restow certain of the discharged containers.

Upon the vessel's arrival at Poland Avenue Wharf, Edward Stettinius, General Superintendent for Coastal Cargo Company, boarded the M/V SUCRE and inspected the vessel prior to beginning cargo operations. (Stettinius deposition at pp. 74-75).[1] According to Stettinius, Coastal Cargo's normal procedure is for a superintendent to board and inspect a vessel prior to beginning cargo operations. However, such an inspection does not extend to inspecting the tops of containers. (Stettinius deposition at pp. 59-60). Stettinius further testified that the responsibility for identifying potentially

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[1] Stettinius testified as the corporate representative of Coastal Cargo at the 30(b)(6) deposition of Coastal Cargo.

hazardous conditions is placed on Coastal Cargo's longshoremen. If a potentially hazardous condition is discovered during operations, the longshoreman is required to notify his foreman or the superintendent. (Stettinius deposition at pp. 38, 55). If the condition exists aboard the vessel, the superintendent will notify the vessel's crew and request the crew to remedy the situation. If the situation exists on the wharf, Coastal Cargo will remedy the condition. (Stettinius deposition at p. 56). In either case, Coastal Cargo maintains equipment and supplies to clean up or otherwise remedy accumulations of oil, slippery substances and other hazards. (Stettinius deposition at p. 52). On this particular occasion, Stettinius boarded and inspected the M/V SUCRE, and satisfied himself that Coastal Cargo could carry out its discharge operations without any problem. (Stettinius deposition at pp. 79, 84). During the entire cargo operations, there were no complaints regarding vessel conditions made either to a Coastal Cargo superintendent, or the vessel's crew. (Stettinius deposition at pp. 137-138, 166-167, 169). Specifically, no complaints were made regarding any oil or foreign substance on the container tops. (Stettinius deposition at p. 156-157; Booker deposition at p. 34; Falgoust deposition at p. 26).

Discharge operations began at 1430 hours on 21 January 1990. As indicated above, certain containers were discharged from the M/V SUCRE, and set aside to be restowed aboard the vessel at a later time. One of the containers designated for restow was Container No. INNU 2109086 (hereinafter designated "the 20 foot container"). On the voyage from Miami to New Orleans, this container was stowed in Bay 5, Space 82.04. This means the container was stowed on top of the No. 2 hold, third container from the port side and was the only container in the tier. This container was discharged sometime prior to the evening meal break at 1800 hours on 21 January 1990 (Harang deposition at p. 27), and restowed between 2150 hours and 2320 hours. (Stettinius deposition at p. 135). This container was restowed in the EP-41 position.

Discharge was uneventful until 2320 hours when plaintiff attempted to jump the four foot nine inch (4'09") space between "the 20 foot container" stowed in the EP-41 position and the row of containers atop the No. 2 hold. Plaintiff fell between the wharf and the vessel, eventually landing on a piling below the wharf. He was thereafter evacuated to Charity Hospital for treatment.

Defendants submit the sole cause of plaintiff's accident was his own negligence, in jumping

between container tops, a known unsafe practice. (Booker deposition at p. 43; Falgoust deposition at p. 33; Stettinius deposition at pp. 39-44). Plaintiff's own testimony is that he considered it unsafe to jump a distance greater than four feet, even though he had done so in the past. (C. Turner deposition at pp. 63-64).[2] Here, plaintiff was attempting to jump four feet nine inches (4'09"). Plaintiff testified the proper method of getting from the top of one container to another, when a distance of four feet or more separated the two containers was to climb down a ladder from the first container, and up the ladder to the second container. (C. Turner deposition at p. 63). The other longshoremen agree that the safest method of moving from container top to container top is to climb down and then climb back up. (Falgoust deposition at pp. 21-22; Harang deposition at p. 30). Coastal Cargo General Superintendent Stettinius also testified that climbing down and back up was one of the approved means to move from container to

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[2] Plaintiff later charges his testimony saying he would consider it unsafe to jump a distance greater than 3 1/2 feet. (C. Turner deposition at pp. 65-67).

container. (Stettinius deposition at pp. 39-40).[3]

There was no reason for plaintiff to be in any hurry to move from "the 20 foot container" at position EP-41 to the other row of containers atop the No. 2 hold, because no cargo operations were underway while the vessel's crane was being rerigged to accommodate a different size container. (Booker deposition at p. 15; Falgoust deposition at p. 18; Harang deposition at p. 14, Stettinius deposition at p. 134). There was absolutely no reason that plaintiff could not have utilized one of the approved methods for moving from container top to container top.

The uncontroverted evidence is that plaintiff routinely disregarded his employer's safety rules and jumped between containers, (C. Turner deposition at p. 62-65; Booker deposition at pp. 43-44; Falgoust deposition at p. 20; Harang deposition at pp. 30-31; Stettinius deposition at p. 47), even after being told by Coastal Cargo supervisors not to jump. (Booker deposition at pp. 43-45). Defendants submit that regardless of the condition of "the 20 foot container" top, the sole cause of

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[3] The other approved method is to lay a ladder across the gap and crawl across.

plaintiff's accident was his intentional disregard of safety rules and disregard for his own safety.

Plaintiff, however, contends that it was not jumping from container to container that caused his injury, but rather oil on the top of the container which caused him to slip. Defendants submit that even if the oil on top of the container played some role in plaintiff's fall, defendants still bear no responsibility for the accident. While plaintiff contends the oil originated from the vessel's Nos. 1 and 2 pedestal crane, and Coastal Cargo's Calmar top end loader (hereinafter "top end loader") proves the source of the container top oil was <u>not</u> the vessel's cranes, but rather, Coastal Cargo's top end loader.

Plaintiff claims that be because he suffered a head injury in the fall, his own recollection of the facts of the incident are very confused. (C.Turner deposition at pp. 92-99). Plaintiff's recollection regarding the day of his accident are confused due to the "visions" of his accident he claims to suffer. Plaintiff is unable to differentiate what he actually remembers happening and what he "sees" happening in his "visions." Therefore, the testimony of the other longshoremen witnesses becomes very important. The other

longshoremen all testified that there was oil on top of "the 20 foot container", and no other containers, when "the 20 foot container" was originally discharged. (Booker deposition at pp. 29, 38-39; Falgoust deposition at p. 25; Harang deposition at p. 21). The oil on top of "the 20 foot container" was easily seen. (Booker deposition at p. 29; Falgoust deposition at pp. 35-36; Harang deposition at p. 44).

Even though the longshoremen allege they saw the oil prior to the initial discharge, they did not report it to the superintendent. (Booker deposition at p. 34; Falgoust deposition at p. 26; Stettinius deposition at pp. 137-138). According to Coastal Cargo policy, the oil should have been reported by the longshoremen. (Stettinius deposition at pp. 156-157).

Defendants submit that the scientific evidence in this case will disprove the longshoremen's version of the facts. The day after plaintiff's accident, defendants obtained samples of the oil from the top of "the 20 foot container", the vessel's Nos. 1 and 2 pedestal crane, and the top end loader, owned and operated by Coastal Cargo. Later a second sample was obtained from the top end loader. The results of the scientific analysis by Spectrochem of the samples show

conclusively that the oil on "the 20 foot container" came from the top end loader and not the vessel's crane. Both specimens from the top end loader are similar to the sample from "the 20 foot container," while the sample from the vessel's crane is different. (See report of Spectrochem, attached hereto as Exhibit "A".)

Thus, the oil could not have been on "the 20 foot container" until after the container was discharged initially by Coastal Cargo. Defendants submit that oil leaded onto the top of "the 20 foot container" while located on the wharf. Coastal Cargo's top end loader constantly leaks oil and needs repairs to its hydraulic system, (Stettinius deposition at p. 114; Booker deposition at p. 39), and has in fact leaked oil onto container tops in the past. (Booker deposition at p. 41). The top end loader is occasionally used to move 20 foot containers, (Booker deposition at p. 50), and it is occasionally left with its spreader bars parked over containers. (Stettinius deposition at pp. 119-120). Thus, defendant maintains the oil leaked from the Coastal Cargo top end loader after "the 20 foot container" had been discharged and before it was reloaded onto the vessel.

Defendants submit that there are three possible factual scenarios for when the oil was first present on "the 20 foot container": Scenario 1, that the oil was present prior to Coastal Cargo beginning its operations; Scenario 2, that the oil accumulated after initial discharge, but prior to being restowed and originated from the top end loader; and, Scenario 3, that the oil was not present at the time the vessel was inspected, but accumulated during cargo operations and originated from the vessel's gear.[4] Defendants are entitled to Summary Judgment as a matter of law under any and all of the three scenarios.

ARGUMENT

Defendants, Ocean Nymph and Columbia, maintain there is no vessel negligence under any of the factual scenarios presented in this case and, accordingly, they are entitled to summary judgment, dismissing plaintiff's claims as a matter of law.

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[4]Defendants submit that Scenario No. 3 is highly unlikely, given the uncontroverted scientific evidence in this case, but, nevertheless, defendants will analyze it as a possibility for the sake of completeness.

There is no question that plaintiff is a covered employee under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. Under § 905(b) of the Act, plaintiff solely has a cause of action against the vessel for injuries sustained as a result of the vessel's negligence.

This section of the Act, in pertinent part, provides:

> If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted, if the action was caused by the negligence of persons engaged in . . .

APPENDIX G

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, wife of/and CRAYTON K. TURNER	CIVIL ACTION NO. 90-0727
VERSUS	SECTION "J"
OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIP-MANAGEMENT LIMITED	MAG. DIV. (2)

UNCONTESTED MATERIAL FACTS

NOW INTO COURT, through undersigned counsel, come defendants Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited, and solely for the purposes of the accompanying Motion for Summary Judgment, and pursuant to Local Rule 2.09, submits the following Statement of Uncontested Material Facts.

1. The M/V SUCRE was a general cargo vessel owned by Columbia Shipmanagement Limited and operated by Ocean Nymph Shipping Co., Ltd. on 21 January 1990.

2. Coastal Cargo Company contracted with the charterers of the M/V SUCRE to provide stevedoring services to the M/V SUCRE at the Poland Avenue Wharf during January 1990.

3. Crayton K. Turner was employed by Coastal Cargo Company as a longshoreman.

4. Crayton K. Turner was assigned by Coastal Cargo Company to act as a longshoreman during cargo operations aboard the M/V SUCRE.

5. Edward Stettinius, General Superintendent at Coastal Cargo Company, acted as superintendent during cargo operations conducted aboard the M/V SUCRE on 21 January 1990 and 22 January 1990. (Stettinius deposition at pp. 74-75).

6. Edward Stettinius, as acting superintendent, inspected the M/V SUCRE prior to Coastal Cargo beginning cargo operations. (Stettinius deposition at pp. 74-75).

7. Coastal Cargo's pre-cargo operations inspection policy does not require inspection of the tops of containers aboard vessels. (Stettinius deposition at pp. 59-60).

8. Edward Stettinius, as acting superintendent, satisfied himself following inspection of the M/V SUCRE that Coastal Cargo could conduct cargo operations with reasonable safety. (Stettinius deposition at pp. 79-84).

9. Neither Coastal Cargo nor any of its employees made any complaints to the crew of the M/V SUCRE regarding the condition of the vessel or its gear during cargo operations conducted on 21 January 1990. (stettinius deposition at pp. 137-138, 166-169).

10. Neither Coastal Cargo nor its employees made any complaints to the crew of the M/V SUCRE regarding oil on the tops of any containers. (Stettinius deposition at pp. 156-157; Booker deposition at p. 34; Falgoust deposition at p. 26).

11. Plaintiff fell while jumping from a 20 foot container located at stowage position EP-41 to the first tier of containers located above the No. 2 hold.

12. The oil on top of the container located at stowage position EP-41 was easily seen by all longshoremen. (Booker deposition at p. 29; Falgoust

deposition at pp. 35-36; Harang deposition at p. 44).

13. The Coastal Cargo longshoremen took no affirmative action to either report the oil on top of the containers or to remedy the only condition. (Booker deposition at p. 34; Falgoust deposition at p. 26; Stettinius deposition at pp. 137-138).

14. Coastal Cargo Company's policy requires that longshoremen report any hazardous conditions to their superintendent. (Stettinius deposition at pp. 38, 55, 156-157).

15. Coastal Cargo maintains equipment and supplies to clean up, or otherwise remedy accumulations of oil or other slippery hazards. (Stettinius deposition at p. 52).

16. Plaintiff considered it to be unsafe to jump between containers if the distance exceeded 3 1/2 to 4 feet. (C. Turner deposition at pp. 63-64, 64-67).

17. Plaintiff had previously been warned not to jump from container to container. (Booker deposition at pp. 43-45).

18. No cargo operations were proceeding at the time of plaintiff's accident. (Booker deposition at p. 15; Falgoust deposition at p. 18; Harang deposition at p. 14; Stettinius deposition at p. 134).

19. The oil on top of "the 20 foot container" did not come from the vessel's Nos. 1 and 2 pedestal cranes.

20. The oil on top of "the 20 foot container" came from Calmor top end loader, owned and operated by Coastal Cargo.

21. Coastal Cargo's policy is that jumping from container top to container top is an unsafe act. (Stettinius deposition at pp. 39-44; Booker deposition at pp. 43-45).

22. Coastal Cargo's policy is that the safe method of moving from container top to container top is to climb down a ladder and then climb back up or to lay a ladder down between the containers and crawl across (Stettinius deposition at pp. 39-40).

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

/s/ Lawrence R. Plunkett, Jr.
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Attorneys for Defendants,
Ocean Nymph Shipping Co., Ltd.
and Columbia Shipmanagement
Limited

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded to all counsel of record by placing a copy of same in the United States Mail, postage prepaid, this 30th day of July, 1991.

/s/ Lawrence R. Plunkett, Jr.

APPENDIX H

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Aug. 20, 1991

DONNA TILLMAN TURNER wife of/and CRAYTON K. TURNER	CIVIL ACTION NO. 90-0727
VERSUS	SECTION "J"
OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIPMANAGEMENT	JUDGE CARR MAGISTRATE WYNNE

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

MAY IT PLEASE THE COURT:

This claim arises out of a January 21, 1990 accident in which plaintiff, Crayton Turner, slipped and fell from a container aboard the defendant's vessel, the M/V SUCRE, while it was docked in the Port of New Orleans. When plaintiff slipped, he fell approximately fifty feet, landing on his head on the concrete piers of the dock. He was unconscious for approximately three months and suffers from residual deafness in one ear, partial paralysis in one leg, partial paralysis in one arm, and brain

damage which affects his memory, intelligence, and personality. Plaintiff alleges that he slipped from the M/V SUCRE in oil located on top of a twenty foot container located on that vessel just beneath one of the vessel's cranes. Plaintiff further alleges that this ship's crane leaked oil (Stettinius deposition, pages 81 and 82); and that the oil was on the container when the M/V SUCRE arrived in the Port of New Orleans (Falgoust deposition, page 25; Booker deposition, page 29; Harang deposition, page 21). Plaintiff contends that the existence of oil on top of a container in an area where the vessel knew stevedores would have to work is a breach of the vessel's duty owned to stevedores to provide a reasonably safe place to work. Plaintiff further contends that this defect was hidden in that it was located on the top of a container which had other containers located on top of it and that the vessel failed to warn plaintiff and his fellow stevedores of this defect. Plaintiff further contends that this is a hazard under the control of the ship, in that the ship's own crane created the hazard. Lastly, plaintiff contends that the M/V SUCRE had knowledge of the oily container top (or was charged with such knowledge) and that it further had knowledge that stevedoring operations with regard to this container were nevertheless being

conducted by plaintiff's employer and that the vessel should have intervened.

As will appear from plaintiff's response to the defendant's statement of allegedly uncontested material facts, most of the facts material to this case are contested by the parties. The defendants' motion should therefore be denied on that basis. Additionally, plaintiff submits that the law does not support the granting of defendants' motion.

The party seeking Summary Judgment bears the initial burden of demonstrating that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Here, the defendant claims that the oil substance on which plaintiff slipped came from a dock side source. Plaintiff and all of his co-workers claim that the oil substance was on the container in question when the M/V SUCRE arrived in the Port of New Orleans.

The United States Supreme Court has held that, before turning over the vessel to a stevedore, a shipowner must exercise due care to insure that the ship and its equipment are in such a condition that an experienced stevedore will be able by the exercise of reasonable care to carry on its operations with reasonable safety to persons and property. Even after

stevedoring operations have begun, the vessel owner has a duty to intervene in the stevedore's operations when he has actual knowledge both of a hazardous condition and that the stevedore, in the exercise of obviously improvident judgment, intends to continue work in spite of that condition. Scindia Steam Navigation Co. v. de los Santos, 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed. 2d 1 (1981).

"Vessel owner liability may arise: (1) if the vessel owner fails to warn on turning over the ship of hidden defects of which he should have known; or (2) for injury caused by hazards under the control of the ship; or (3) if the vessel owner fails to intervene in the stevedore's operations when he has actual knowledge both of the hazard and that the stevedore, in the exercise of obviously improvident judgment, means to work on in the face of it and therefore cannot be relied on to remedy it." Masinter v. Tenneco Oil Co., 867 F.2d 892 (5th Cir. 1989) The obviousness of a danger, although relevant to the first exception listed above, bears no significance to a vessel owner's duty caused by hazards under the control of the ship, which is exception no. 2, above. Masinter, Supra.

A shipowner has no defense that a hazard was open and obvious. Stassi v. American Commercial Lines, Inc., 720 F.2d 879 (5th Cir. 1983); 56 Tul. L. Rev. 1421 (1982); Treadaway v. Societie Anonyme Louis-Dreyfus, 894 F.2d 161 (5th Cir. 1990).

Maintenance and repair of a ship's winch (or crane) is the sole responsibility of the ship's crew. Where a longshoreman is injured as a result of defective ship's equipment, a reasonable jury could find that the ship should stop loading operations until the winch (or crane) could be made safe. There are circumstances in which a shipowner has a duty to act where the danger to longshoremen arises from malfunctioning of the ship's gear being used in cargo operations. Viator v. Hellenic Lines, 558 F. Supp. 700 (E.D. Tx. 1983).

Where water and oil existed in a work area when the longshoremen first board a vessel, a jury may find that a vessel owner breached its duty that it owed to the longshoremen to provide a reasonably safe place to work even if the accumulation of water and oil was visible and thus known to the longshoremen. Treadaway, Supra.

If a condition exists from the outset, the shipowner is charged with actual

knowledge of the dangerous condition. Hernandez v. M/V RAJAAN, 841 F.2d 852 (5th Cir., 1988). Where a vessel owner, through its actions and failures to act, sets the stage for an accident, even if that event required the negligence of a stevedore to appear on the scene before it could occur, the allocation of the stevedore's fault to the vessel owner is reasonable. Woods v. Sammisa Co., Ltd., 873 F.2d 842 (5th Cir. 1989).

Even if a stevedore or its employees were negligent and that negligence was a proximate cause of the plaintiff's injury, only if a reasonable jury could reach no other conclusion but that the stevedore's negligence was the sole cause of the injury, should Summary Judgment be granted in favor of the vessel owner. Gay v. Barge 266, 915 F.2d 1007 (5th Cir. 1990).

Here, there are many facts in dispute. For this, and the aforementioned reasons, plaintiffs submit that the defendants' motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to all counsel of record by placing a copy of same in the United States mail, postage prepaid, addressed to the offices of said attorney(s) this 20 day of Aug., 1991.

/s/ Harold M. Wheelahan, III
Harold M. Wheelahan, III

APPENDIX I

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, wife of/ and CRAYTON K. TURNER	CIVIL ACTION NO. 90-0727 SECTION "J"
VERSUS	
OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIPMANAGEMENT	Judge Carr Magistrate Wynne Judge Carr

* * * * * * * * * * * * * * * * * * * *

PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF ALLEGEDLY UNCONTESTED MATERIAL FACTS

NOW INTO COURT, through undersigned counsel, come plaintiffs, Donna Tillman Turner, wife of and Crayton Turner, who respond to the Statement of Allegedly Uncontested Material Facts submitted by defendants, Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement, Ltd., as follows:

I.

Plaintiffs admit the allegations of Paragraph I.

II.

Plaintiffs admit the allegations of Paragraph II.

III.

Plaintiffs admit the allegations of Paragraph III.

IV.

Plaintiffs admit the allegations of Paragraph IV.

V.

Plaintiffs admit the allegations of Paragraph V.

VI.

Plaintiffs specifically deny that Edward Stettinius inspected the M/V SUCRE prior to Coastal Cargo beginning cargo operations. In his deposition, Mr. Stettinius testified: "Question: What did you do aboard the vessel? Answer: I got stowage informage with the port captain and the chief mate and proceeded to discharge the vessel." (Page 74)

VII.

The allegations of Paragraph VII are admitted insofar as they state that Coastal Cargo's pre-cargo operations inspected policy does not require inspection

of the tops of containers aboard the vessels. Stettinius testified "you have containers stacked on top of one another and its not possible in those cases." (Page 60).

VIII.

The allegations of Paragraph VIII are denied as stated, because Stettinius testified that it was impossible to inspect parts of the vessel that the Coastal Crew would need to deal with such as the tops of containers that had other containers stacked on top of them. (Page 60).

IX.

The allegations in Paragraph IX are denied as stated. It is admitted that Stettinius did not make a complaint to the crew of the M/V SUCRE regarding the condition of the vessel or its gear on 21 January 1990.

X.

The allegations of Paragraph X are denied as stated. It is admitted that Stettinius made no complaint to the crew of the M/V SUCRE regarding oil on the tops of any containers until the day after the accident. (Stettinius deposition, at pages 155 and 156).

XI.

The allegations of Paragraph XI are denied insofar as they categorize plaintiff's stepping from one container to another as a jump. It is not necessary to jump from one container to another. (Harang deposition, page 29; Crayton Turner deposition, pages 63 and 64.)

XII.

It is admitted that both Falgoust and Harang have testified that they could easily see what was variously categorized as "oil" or "grease" on top of the container. Falgoust and Harang both testified that they dealt with this container during the day time. Whether other longshoremen could see the slippery substance on the container later that night at the time of Turner's accident is purely speculative. The allegations of Paragraph XII are therefore denied.

XIII.

The allegations of Paragraph XIII are denied as written. It is admitted that Booker and Falgoust noticed the oily substance during day light hours and spoke to their immediate co-workers about it. All other allegations of Paragraph XIII are denied. (Falgoust deposition, page 28).

XIV.

The allegations of Paragraph XIV are denied as stated. The Coastal Cargo workers were unaware of any such policy.

XV.

The allegations of Paragraph XV are denied as written. It is admitted that sawdust is kept in the warehouse which is sometimes spread on slippery substances.

XVI.

The allegations of Paragraph XVI as written. The context of the plaintiff's testimony is that if he could step between containers he felt it was safe. He did not feel it was safe to jump between containers. It was not necessary to jump from number 2 to the forty footers. (Harang deposition, page. 29).

XVII.

The allegations of Paragraph XVII are denied. Recorded testimony simply states that Booker, a Coastal worker, had been warned not to jump from container to container.

XVIII.

The allegations of Paragraph XVIII are denied. The

quoted testimony is that the crew was re-rigging the ship's crane to load different types of containers.

XIV.

The allegations of Paragraph XIV are denied. The M/V SUCRE's cranes consistently leaked oil and the twenty foot container in question was stowed right below the crane. (Deposition, Edward Stettinius, pages 81 and 82).

XX.

The allegations of Paragraph XX are denied. The top end loader was not used to load the twenty foot container and therefore could not have leaked oil on the twenty foot container. (Harang deposition, page 28).

XXI.

The allegations of Paragraph XXI are denied as written in that Coastal Cargo's policy and its means of dissemination are in dispute. (Harang deposition, page 31).

XXII.

The allegations of Paragraph XXII are denied in that at least some of the Coastal employees had never been told that this was company policy. (Falgoust deposition, page 22).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to all counsel of record by placing a copy of same in the United States mail, postage prepaid, addressed to the offices of said attorney(s) this 20 day of Aug., 1991.

/s/ Harold M. Wheelahan, III
Harold M. Wheelahan, III

APPENDIX J

VERBATIM TEST OF 33 U.S.C. §905(b)

"NEGLIGENCE OF VESSEL:

In the event of injury of a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provision of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such

person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

APPENDIX K

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, wife of/ and CRAYTON K. TURNER	CIVIL ACTION NO. 90-0727
Plaintiffs,	SECTION "J"
VS.	MAG. DIV. 3
OCEAN NYMPH SHIPPING CO., LTD AND COLUMBIA SHIPMANAGEMENT, LIMITED,	
Defendants	

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

This action arises under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §905(b), as a result of an injury to Crayton K. Turner on January 21, 1990. The accident occurred aboard the M/V SUCRE, and the plaintiffs, Donna and Crayton Turner, brought suit against Ocean Nymph Shipping Co., Ltd., the operator of the M/V SUCRE, and Columbia Shipmanagement,

Limited, the owner of the M/V SUCRE. CIGNA Insurance Companies (CIGNA) filed a Petition for Intervention in the above-captioned matter to protect its compensation *lien in the event that the* plaintiffs recover in this suit. Trial of this matter is scheduled to begin on September 23, 1991.

The defendants, Ocean Nymph and Columbia have moved for Summary Judgment dismissing the plaintiffs' complaint against them on the grounds that no genuine issue of material fact exists and that they are entitled to Summary Judgment as a matter of law. CIGNA respectfully submits that issues of material fact do exist and that the defendants' Motion for Summary Judgment is therefore inappropriate. Accordingly, CIGNA respectfully requests that the Court deny the defendants' Motion for Summary Judgment.

FACTS

On January 21, 1990, the plaintiff, Crayton K. Turner, was inured as the result of an accident aboard the M/V SUCRE, a vessel owned, operated, and controlled by Ocean Nymph Shipping Company, Ltd., and/or Columbia Shipmanagement, Limited. Mr. Turner, a stevedore employed to perform work aboard the M/V SUCRE. He was allegedly injured when he slipped in a foreign substance on a cargo container on

the vessel. He then fell approximately fifty feet from the top of the container on the deck of the M/V SUCRE to a cement piling which supported the dock. As consequence of Mr. Turner's alleged injuries, CIGNA, the workers' compensation insurer for Coastal Cargo Company has paid compensation and medical benefits to Mr. Turner.

The defendants contend that the oil in which Mr. Turner slipped was not present on the cargo container when off-loading began. However, testimony from other stevedores present at the time of the accident refute that contention. Therefore, a material issue of fact is in dispute, and Summary Judgment is inappropriate.

LAW AND ARGUMENT

Summary Judgment is appropriate and may be granted when the moving party establishes the right to judgment "with such clarity that the non-moving party cannot recover under any discernible circumstance." Jones v. Western Geophysical Co. of America, 669 F.2d 280, 283 (5th Cir. 1982). Furthermore, all evidence must be viewed in a light most favorable to the non-moving party. Id. Rule 56 of the Federal Rules of Civil Procedure provide that Summary Judgment may be granted only when the entire record, including depositions, shows that no genuine issues of material fact

exist. "The mover must bear the burden of proof, and 'all reasonable doubts as to the existence of the genuine issue of material fact' have to be resolved against him." Jones, 669 F.2d at 283 (citing, Erco Industries, Ltd. v. Seaboard Coast Line Railroad Company, 644 F.2d 424, 428 (5th Cir. 1981)). The Jones court further noted that the trial court should not decide factual issues, but only determine whether issues of fact exist. Id. (See also, First Nat'l Bank of Columbus, Columbus, Georgia v. Pelican Homestead and Sav. Assoc., 869 F.2d 896, 898 (5th Cir. 1989)).

The defendants initially claimed that the oil on top of the twenty foot container was not present at the commencement of the unloading operations. See Defendants' Memorandum in Support of Motion for Summary Judgment, pp. 6-7. However, depositions from longshoremen witnesses controvert the defendants' contention. An issue of fact exists as to whether the oil on top of the twenty foot cargo container from which the plaintiff slipped was present before off-loading operations began. See Booker Deposition at p. 29, lines 4-13 (attached Exhibit "A"); Falgoust Deposition, p. 24, lines 23-25 and p. 25, lines 1-6 (attached Exhibit "B"); Harang Deposition, p. 20, lines 2-12 and attached Statement,

pp. 3-4 (attached Exhibit "C"). The question of when and how the oil appeared on top of the twenty foot cargo container is evidence of a genuine issue of material fact which renders Summary Judgment inappropriate. Therefore, this Honorable Court should deny the defendants' Motion for Summary Judgment. The defendants also claim that the origin and time that the oil appeared on the cargo container is irrelevant and that they are entitled to judgment as a matter of law. CIGNA respectfully submits that the defendants are not entitled to summary judgment as a matter of law because the existence of oil on the container raises an issue of vessel negligence which cannot be decided in a summary proceeding.

The issue of vessel negligence is usually a question of fact for the jury. Randolph v. Laeisz, 896 F.2d 964, 971 (5th Cir. 1990). In Randolph, the court reviewed the duties that a vessel owner owes to longshore workers under Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S.Ct. 1614 (1981).

> Two general tenets underlie the distribution of these duties: first, as a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoreman to unreasonable hazards;

> second, the vessel owes the stevedore and his longshoremen employees the duty of exercising due care under the circumstances.

Randolph, 896 F.2d at 970.

The Randolph court also noted the vessel duties delineated under Scindia: (1) the vessel owner must warn the stevedore and longshoremen of hidden defects of which he, the vessel owner, should have known; (2) the vessel owner is responsible for injury caused by hazards under the control of the ship; and (3) the vessel owner is liable for injury resulting from a failure to intervene in the stevedore's operations when he has actual knowledge both of a hazardous condition and that the stevedore is exercising "obviously improvident" judgment and cannot be relied upon to remedy the hazard. Randolph, 896 F.2d at 970 (citing, Masinter v. Tenneco Oi Co., 867 F.2d 892 (5th Cir. 1989).

In Randolph, the court held that summary judgment was inappropriate when disputed questions of fact existed regarding whether a slightly damaged gangway created an "unreasonable risk of harm and if the stevedore's decision to continue to use the gangway was so 'obviously improvident' as to

trigger the vessel duty to intervene." Id. at 971.

In Treadway v. Societe Anonyme Louis-Dreyfus, 894 F.2d 161 (5th Cir. 1990), the court discussed a vessel's duty to exercise ordinary care and to warn of defects before operations commenced. The plaintiff, Treadway, argued that Louis-Dreyfus was negligent in failing to detect and eliminate water and oil in an area traversed by longshoremen. Id. at 165. The court concluded that although Louis-Dreyfus breached its duty to exercise ordinary care to provide a reasonably safe place to work, the ship owner was not liable unless the plaintiff could establish that

(1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or

(2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances.

Id. at 166.

The court determined that the jury's decision that water and oil were present at the beginning of the longshoring operations

was reasonable despite some conflicting evidence presented by the parties. Id. at 166. Moreover, the court concluded that the plaintiff's knowledge of the dangerous condition or its obviousness did not preclude the plaintiff's recovery. Id. at 167.

In the instant case, in addition to the unresolved issue of fact regarding the origin of the oil and the time at which the oil appeared on the cargo container, the issue of the scope and extent of vessel negligence is in dispute. Because the question of negligence is generally a question of fact for the jury, Summary Judgment is inappropriate.

Therefore, CIGNA respectfully requests that this Honorable Court deny the defendants' Motion for Summary Judgment on the grounds that genuine issues of material fact exist and that the defendants are not entitled to Summary Judgment as a matter of law.

Respectfully submitted,

/s/ Kathleen K. Charvet
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing pleading on all counsel of record in these proceedings by depositing same in the U.S. Mail, postage pre-paid, to their proper addresses on this 21st day of August, 1991.

/s/ Kathleen K. Charvet

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, wife of/ and CRAYTON K. TURNER Plaintiffs,	CIVIL ACTION NO. 90-0727 SECTION "J"
VS.	MAG. DIV. 3
OCEAN NYMPH SHIPPING CO., LTD AND COLUMBIA SHIPMANAGEMENT, LIMITED, Defendants.	

STATEMENT OF CONTESTED MATERIAL FACTS

1. The foreign substance on top of the twenty foot container was present at the commencement of the unloading operations aboard the M/V SUCRE on January 21, 1990.

2. The oil on top of the twenty foot cargo container which caused Mr. Turner to slip and injure himself originated on the M/V SUCRE.

3. The M/V SUCRE failed to correct a dangerous condition

aboard the vessel before off-loading operations began.

Respectfully submitted,

/s/ Kathleen K. Charvet
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing pleading on all counsel of record in these proceedings by depositing same in the U.S. Mail, postage pre-paid, to their proper addresses on this 21st day of August, 1991.

/s/ Kathleen K. Charvet

Supreme Court, U.S.
FILED
JAN 27 1993
OFFICE OF THE CLERK

No. 92-1027

In The

Supreme Court of the United States

October Term, 1992

CRAYTON K. TURNER and DONNA TILLMAN TURNER,

Petitioners,

vs.

OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIPMANAGEMENT LIMITED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents, Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited (collectively referred to as "Columbia"), disagree with Petitioners' statement of the questions presented for review. The questions presented for consideration are:

1. Whether summary judgment dismissing Petitioners and Intervenor's claims was appropriate when there was no genuine issue of material fact in dispute and no basis for the claims as a matter of law.

2. Whether summary judgment dismissing Petitioners and Intervenor's claims was appropriate where the courts below correctly found that Respondents were not liable under the rationale of *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981) and its progeny.

LIST OF INTERESTED PARTIES

1. Crayton K. Turner – Petitioner/Plaintiff

2. Donna Tillman Turner – Petitioner/Plaintiff

3. Harold M. Wheelahan, III and Dawn Adams Wheelahan, Attorneys for Petitioners/Plaintiffs

4. Coastal Cargo, Inc. – Petitioner Crayton K. Turner's Employer

5. CIGNA Insurance Companies – Intervenor

6. Peter L. Hilbert, Kathleen K. Charvet, and the law firm of McGlinchey, Stafford, Cellini & Lang – Attorneys for CIGNA Insurance Companies

7. Ocean Nymph Shipping Co., Ltd. – Respondent/Defendant

8. Columbia Shipmanagement Limited – Respondent/ Defendant

9. Robert H. Murphy, Lawrence R. Plunkett, Jr., and the law firm of Murphy, Williams, Rogers & Sloss, Attorneys for Respondents/Defendants

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No. 92-1027

In The

Supreme Court of the United States

October Term, 1992

CRAYTON K. TURNER and DONNA TILLMAN TURNER,

Petitioners,

vs.

OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIPMANAGEMENT LIMITED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited (collectively referred to as "Columbia"), submit that there is no basis for granting a writ of certiorari in this case. Petitioners, a longshoreman and his wife, brought suit under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq.* The district court was presented with the undisputed material facts and viewing all material facts most favorably to the non-movants,

together with the application of the appropriate law, granted summary judgment dismissing Petitioners' suit. The Court of Appeals correctly affirmed the district court. The decisions of the Court of Appeals and the district court neither raise any unsettled issues warranting this Court's attention, nor conflict with any decision of this Court or any United States Court of Appeals. Furthermore, Petitioners' writ application is essentially a verbatim duplication of the arguments presented to and soundly rejected by the Fifth Circuit Court of Appeals. Petitioners have presented no compelling reason for granting certiorari to review a carefully reasoned summary judgment completely supported by the contolling law. Petitioners' application for a writ of certiorari should, therefore, be denied.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Petitioners, Crayton K. Turner and Donna Tillman Turner, filed suit on February 28, 1990 under the Longshore and Harbor Workers' Compensation (LHWCA), 33 U.S.C. § 901, *et seq.*, against Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited (collectively referred to as "Columbia"), respectively the owner and operator of the M/V SUCRE. Crayton K. Turner ("Turner"), a longshoreman employed by Coastal Cargo, Inc. ("Coastal"), alleged that Columbia had negligently caused his injury when he fell while attempting to jump to a container during cargo operations aboard the vessel. CIGNA Insurance Companies, Coastal's compensation carrier, subsequently intervened to recover benefits paid to Petitioners under the LHWCA.

Columbia filed a motion for summary judgment on July 30, 1991. By minute entry and judgment dated September 3, 1991, the district court granted Columbia's motion and dismissed Petitioners' suit. (Writ Petition, pp. A-1 - 5). Following the denial

on October 1, 1991 of their motion for new trial, (Writ Petition, p. A-6), Petitioners and Intervenor appealed to the United States Court of Appeals for the Fifth Circuit. On September 25, 1992, the Fifth Circuit affirmed the decision of the district court. (Writ Petition, pp. A-7 - 8).

B. Statement of Facts

The M/V SUCRE is an ocean-going general cargo vessel which was owned and operated by Columbia in January 1990. The vessel's design accommodated containerized cargo and allowed the stowage of a 20-foot container athwartship, on a four-legged pedestal, just aft of the vessel's Nos. 1 and 2 pedestal crane and just forward of the No. 2 hold near the port side. This location is known as stowage position "EP-41". A 20-foot container on this pedestal is level with the first tier of containers stowed on the top of the No. 2 hold, but there is a 4 foot, 9 inch space (4' 09") between them. Turner was attempting to jump this chasm between container tops when he fell and was injured on January 21, 1990.

The M/V SUCRE had previously loaded containerized cargo in Miami, Florida before arriving in New Orleans and berthing at the Poland Avenue Wharf on January 21, 1990. The vessel's charterers arranged for Coastal, a New Orleans stevedore, to discharge some of the containers, load additional containers and restow certain other containers. Upon the vessel's arrival, Coastal's general superintendent, Edward Stettinius, boarded the M/V SUCRE and inspected the vessel and the cargo before Coastal began its operations. (Writ Petition, pp. A-12 - 13). Stettinius' inspection of the M/V SUCRE did not reveal any hazardous conditions, and he was satisfied that Coastal could carry out its cargo operations safely. (Writ Petition, p. A-13). Coastal's cargo operations began at 1430 hours on January 21, 1990, and during the entire discharge and loading operations, the Coastal longshoremen made no complaints of any alleged hazardous condition aboard the vessel either to any Coastal foreman or superintendent or to any of

the vessel's crew. (Writ Petition, p. A-13). Specifically, no one complained about any oil or foreign substance on any container top. (Writ Petition, p. A-13). During cargo operations, certain containers were discharged from the M/V SUCRE and set on the wharf to be restowed aboard the vessel at a later time. One of the containers discharged and designated for restowing was container No. INNU 2109086 (hereinafter designated "the 20-foot container"). This container had been loaded by stevedores in Miami, Florida. Coastal discharged this container and placed it on the Poland Avenue Wharf sometime before the evening meal break at 1800 hours on January 21, 1990. (Writ Petition, p. A-14). Thereafter, between 2150 hours and 2320 hours, Coastal restowed the container aboard the vessel in the EP-41 position on the pedestal just forward of the No. 2 hold. (Writ Petition, p. A-14).

Cargo operations were uneventful until 2320 hours, when Turner attempted to jump from "the 20-foot container," stowed in the EP-41 position, across the 4 foot, 9 inch (4' 09") space onto the row of containers atop the No. 2. hold. Turner sustained injury when he failed to leap far enough, falling between the wharf and the vessel and landing on a piling below.

Container jumping is widely known as an unsafe practice in the longshoring industry. (Writ Petition, pp. A-14 - 15). Turner's fellow Coastal longshoremen agreed that the safest method of moving between container tops is to climb down and up with a ladder. (Writ Petition, p. A-15). General superintendent Stettinius confirmed that Coastal's safety rules prohibited container jumping and that climbing was one of the approved means of moving from container to container. (Writ Petition, p. A-15). Uncontroverted evidence established that Turner routinely disregarded his employer's safety rules and jumped between containers. (Writ Petition, p. A-15). Turner did so even after Coastal's supervisors had specifically warned him not to container jump. (Writ Petition, p. A-15).

When Turner jumped from "the 20-foot container" on January 21, 1990, there was oil on it. This container had been discharged by Coastal, moved by Coastal's equipment on the wharf and restowed by Coastal aboard the vessel earlier that day. Columbia submitted scientific data establishing that the oil on the container top actually came from Coastal's leaky container-moving equipment. However, the district court determined it was not necessary to consider Columbia's scientific evidence to rule on this summary judgment motion. Instead, the district court accepted Petitioners' contention, based on the Coastal longshoremen's testimony, that oil was on top of this container when it was originally discharged from the vessel.[1] (Writ Petition, p. A-16). Whatever its source, the oil was plainly visible to the Coastal longshoremen during cargo operations, both when the container was on the vessel and when it was on the wharf in Coastal's custody. (Writ Petition, pp. A-4, 16).

Even though the longshoremen had observed oil on this container top before the initial discharge, they admittedly did not report it either to their stevedoring foreman and superintendent or to the vessel's crew. (Writ Petition pp. A-16-17). Nor did the Coastal longshoremen attempt to clean up this oil with the available oil spill materials, either when it was on the vessel or on the wharf. (Writ Petition, A-13). According to Coastal's safety policy, the longshoremen should have reported this condition or corrected it themselves. (Writ Petition, pp. 16-17).

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1. Petitioners also alleged that the vessel's Nos. 1 and 2 pedestal crane leaked oil during this cargo opertion, as well as during previous trips to New Orleans. This allegation is completely irrelevant to this matter, as will be discussed more fully below, because the district court accepted Petitioners' contention that the oil was present on top of the container prior to Coastal's commencement of cargo opeations. The district court held that "even assuming that the oil was present from the beginning and not from the stevedore's end loader, the defendants are entitled to summary judgment under *Scindia*." (Writ Petition, p. A-3).

Significantly, Turner had no reason to be in any hurry to move from "the 20-foot container" at position EP-41 to the other row of containers atop the No. 2 hold. When he jumped, a crane was being re-rigged to accommodate a different sized container, and no cargo opertions were underway. (Writ Petition, p. 15). Turner could have easily used an alternative, approved method for moving from container top to container top. No time constraints or job pressure caused him to jump or made using a ladder impractical.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN THIS § 905(b) CASE, BASED ON UNDISPUTED MATERIAL FACTS, AND THE FIFTH CIRCUIT CORRECTLY AFFIRMED.

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure if the record discloses that "there is no genuine issue as to a material fact and the moving party is entitled to a judgment as a matter of law." Once the moving party demonstrates the absence of a material fact by reference to the pleadings, discovery and affidavits on file, the non-moving party bears the burden of designating specific facts demonstrating a genuine issue with regard to a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The mere existence of some disputed matter does not defeat a motion for summary judgment. Only disputes over material facts, that is, facts affecting the outcome of the lawsuit under governing law, will preclude the district court from granting summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply

show that there is some metaphysical doubt as to the material facts. . . . In the language of the rule, the non-moving party must come forward with 'specific facts showing there is a genuine issue for trial.' " *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

Petitioners' argument that summary judgment was improper because there were disputed issues of material fact affecting the outcome of this lawsuit is meritless. Columbia emphasizes to the Court that Petitioners' writ petition does not dispute that Turner was container jumping at the time of this accident, that container jumping is widely known in the stevedoring industry to be a dangerous practice, that Coastal prohibits its longshoremen from container jumping, that Coastal had specifically warned Turner not to container jump before this accident, that oil was on top of the container, and that the oil was easily visible to the Coastal longshoremen well before the accident. These material facts are undisputed. Summary judgment was properly granted based on Petitioners' *own* version of the facts.

Petitioners argue that the courts below erred in granting summary judgment because there was a factual dispute whether the oil was on top of one container when it arrived in New Orleans, as contended by Petitioners, or whether the oil came from Coastal's leaking top end loader, as contended by Columbia. While there were underlying factual questions as to the source of the oil on the container top and when it accumulated there, this dispute is immaterial. Columbia's motion for summary judgment set forth three alternative scenarios as to the source of the oil on top of "the 20-foot container": Scenario 1, that the oil was present before Coastal Cargo began its cargo operations; Scenario 2, that the oil accumulated after initial discharge of the container, but before it was restowed, and therefore originated from Coastal Cargo's top end loader; and Scenario 3, that the oil was not present when the

vessel was inspected, but accumulated during cargo operations and originated from the vessel's gear. Columbia submitted to the district court that summary judgment was warranted under any of these three possible scenarios.

The district court applied Scenario 1, *accepting Petitioners' contention that the oil was on the container top before it was discharged from the vessel.* The district court's acceptance of Petitioners' factual contention was proper and in keeping with the court's duty to view the facts most favorable to the non-movant. *Reid v. State Farm Mutual Automobile Insurance Co.*, 784 F.2d 577, 578 (5th Cir. 1986); *Hunter v. Navrom*, 868 F.2d 1386 (5th Cir. 1989). *Accepting Petitioners' factual allegations as true,* the district court correctly concluded that Columbia was entitled to a judgment of dismissal as a matter of law:

> Even assuming that the oil was present from the beginning and not from the stevedore's end loader, the defendants are entitled to summary judgment under *Scindia.*

(Writ Petition, p. A-3).

For the purposes of its motion for summary judgment, Columbia did not dispute that oil was on top of the container before it was discharged from the vessel. Since the district court accepted Petitioners' factual version that there was oil on the container before discharge, there clearly was no genuine factual dispute between the parties on this issue. Petitioners admit this point at p. 5 of their writ petition:

> Turner alleges that the oil on the container came from the cranes on the M/V SUCRE. Defendant disputes that fact. *For purposes of*

> *ruling on defendant's motion, the trial court assumed that the oil was present on top of the container from the beginning of the cargo operations and did not come from the stevedore's top end loader. . . .*

(Emphasis added). (Writ Petition, p. 5). Petitioners' writ petition is contradictory. While they acknowledge that the district court accepted their version of this factual issue when considering the motion for summary judgment, they nonetheless make the erroneous claim that a material fact on the oil issue was in dispute:

> There was oil on top of the container when it arrived in the Port of New Orleans. The defendant claims that the oil on the container came from the loading operations conducted by plaintiff's employer. *This factual dispute, standing by itself, should cause this Court to reverse the Trial Court.*

(Writ Petition, p. 6). Petitioners blindly fail to recognize that Columbia conceded their factual contention that oil was present on top of the container when it arrived in New Orleans, and that the district court accepted that scenario as fact for purposes of the motion for summary judgment. Concisely, there was no dispute of fact on this issue since Petitioners' version was accepted by the Court.

The mere contention that disputes exist on certain factual issues between parties is insufficient to defeat an otherwise properly supported motion for summary judgment. Petitioners claim that because they "disputed" 17 of Columbia's 22 statements of uncontested material facts, these denials prove there were factual issues in dispute which should prevent summary judgment. However, a review of Petitioners' alleged disputed facts clearly

shows that they failed to set forth any specific facts which constitute a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249. Petitioners had the burden of designating specific facts demonstrating a genuine dispute of a material fact that would affect this lawsuit's outcome under the applicable law. Petitioners failed to set forth any such issue of material fact that would affect Columbia's alleged legal liability under *Scindia* and the governing law. Therefore, the district court properly granted summary judgment and, when presented with *precisely the same argument* relied on by Petitioners in this writ application, the Fifth Circuit correctly affirmed the district court's decision. Respondents maintain there is no basis for granting a writ of certiorari on this issue.

II.

THE FIFTH CIRCUIT AND THE DISTRICT COURT PROPERLY CONCLUDED THAT COLUMBIA WAS NOT LIABLE UNDER *SCINDIA STEAM NAVIGATION CO. V. DE LOS SANTOS* AND ITS PROGENY.

A. The Fifth Circuit And The District Court Properly Concluded That Columbia Was Not Liable Under The First *Scindia* Principle.

Accepting Turner's factual version that oil was on the container top before Coastal commenced cargo operations, the courts below properly analyzed Turner's allegations of shipowner negligence under 33 U.S.C. § 905(b) and the first principle of *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981). In *Polizzi v. M/V ZEPHYROS II MONROVIA*, 860 F.2d 147, 149 (5th Cir. 1988), the Fifth Circuit summarized the applicable law as follows:

> The first *Scindia* principle requires the vessel owner, before turning over the vessel to the

> stevedore, to warn the longshoreman of any hidden defects that would be known to the shipowner in the exercise of reasonable care and to exercise care to deliver the stevedore a safe ship with respect to gear, equipment, tools and work place. These duties are *not breached* if the defect causing the injury was *open and obvious* and one *that the longshoreman should have seen.* An obvious defect should be as apparent to the stevedore and its longshoremen employees as to the shipowner. (Emphasis added).

Polizzi involved a longshoreman who slipped in oil aboard a vessel. Affirming a jury verdict in favor of the vessel owner, the Fifth Circuit noted that the condition of oil should have been open and obvious to the stevedore and the longshoremen and that the stevedore should have taken action to correct the condition. *Polizzi* holds that a shipowner is not legally responsible for an injury caused by an obvious hazardous condition that a careless stevedore fails to remedy.

In *Morris v. Compagnie Maritime des Chargeurs Reunis, S.A.*, 832 F.2d 67, 69 (5th Cir. 1987), the plaintiff longshoreman was injured when the ship's ladder he was using slipped as he was descending it. Morris claimed, and the district court found, that the ladder lacked rubber feet and that this condition had caused Morris' accident. Morris argued that the vessel owner violated the first *Scindia* principle in failing to exericise ordinary care to maintain the ladder in a reasonably safe condition and/or for failing to warn the stevedore of a hidden defect, *i.e.*, the absence of rubber feet on the ladder. The Fifth Circuit reversed the district court's judgment for the plaintiff in *Morris*, holding that the absence of rubber feet was, or should have been, obvious to the stevedore. In such circumstances, the shipowner is only liable if the

longshoreman has no alternative but to continue working in the face of obvious danger. The Fifth Circuit stated:

> We do not understand *Lemon* and *Theriot* to overrule in cases predicating the shipowner's liability on a showing of circumstances pressing the longshoremen to risk a danger notwithstanding the stevedore's knowledge of the danger. As *Pluyer* demonstrates, the longshoreman need not show that he had no possible alternative but to use the defective equipment or to work in a dangerous area. The burden is not so heavy. He need only show that the circumstances made safer alternatives unduly impractical or time consuming. In both *Lemon* and *Theriot,* the longshoremen had no alternative but to stop or delay their work . . . in this case, on the contrary, Morris and the stevedore could have avoided the danger with almost no interruption to their work by using any of the safe ladders "all around the ship" or by using one of the stevedore's own ladders, locked away on deck.

832 F.2d at 71. The *Morris* court recognized that *Scindia's* first principle entitles the shipowner to rely on an expert and experienced stevedore to act with reasonable care, and the shipowner does not have a duty to anticipate the action or inaction of a careless stevedore. In particular, a shipowner is not liable to a longshoreman injured by an obvious danger aboard a vessel when the longshoreman could have avoided the obvious danger by using a safer alternative that was not time-consuming.

In *Teply v. Mobil Oil Corp.*, 859 F.2d 375 (5th Cir. 1988), the Fifth Circuit affirmed a summary judgment dismissing a harbor

worker's Section 905(b) action against a vessel owner. The plaintiff in *Teply* allegedly slipped in oil and water while climbing down a fixed ladder aboard the vessel. The *Teply* court noted that the vessel's employees were not present and were not supervising the plaintiff's work closely and that the vessel owner "could have known of the danger only if it was so obvious that Teply could not have failed to recognize it." The Court stated:

> Ship owners are not liable for obvious dangers that injure contractors aboard their vessels unless the contractors, in order to avoid the danger, would be forced either to leave the job or to face penalties for causing delay .... There is no evidence that Teply was under any time or supervisory pressure, and a good deal of evidence to the contrary. NOEPSI [the vessel owner] therefore cannot be held liable for his fall.

859 F.2d at 378 (footnotes omitted).

Given that the oil on the container top was plainly visible to the Coastal longshoremen both when the container was on the M/V SUCRE and on the wharf, that the Coastal longshoremen could have easily remedied the danger presented by cleaning up the oil, and that there were no time pressures on the Coastal longshoremen, the courts below correctly applied *Scindia, Morris, Polizzi* and *Teply* to conclude that Columbia was not legally responsible for this injury caused by an open and obvious condition.

Furthermore, Turner's act of jumping from one container to another was a violation of established Coastal safety policies and common sense. Coastal and Turner easily could have avoided this accident if Turner had used a safe alternative method available to access the container tops, either using ladders to climb down and

up the containers or by using a ladder between the container tops as a crawling platform. Neither Turner nor Coastal presented any evidence whatsoever that these available, safe alternatives were unduly impractical or time-consuming.

The Fifth Circuit has recognized in *Morris, Polizzi* and *Teply* that if a longshoreman is injured because of an obvious danger, the shipowner is not liable unless the longshoreman can prove he had no choice but to encounter the danger because safer alternatives were unduly impractical or time-consuming. Where the longshoreman and stevedore could have avoided the danger, but failed to take reasonable steps to avoid the hazard, the vessel owner is not responsible and has no duty to anticipate the actions or inactions of a careless stevedore.[2]

Scindia, Morris, Polizzi and *Teply* teach that the shipowner has no duty to anticipate the actions or inactions of a careless stevedore. In this case, the stevedore and its longshoremen failed to act with reasonable care by disregarding their own safety procedures, by failing to clean up a known dangerous condition on a container top and by failing to insure that longshoremen did not

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2. While Petitioners rely on the holding in *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161 (5th Cir. 1990), that decision is inapposite to the facts of this case. In *Treadaway* the plaintiff longshoreman was injured while walking through oil and water on the main dock, an open and obvious hazard. However, there was no safe alternative available to longshoreman Treadaway when facing this obviously unsafe condition. Thus, the court held that there was a basis for a jury to find vessel liability. In the present case, the stevedore and its longshoremen knew of the open and obvious oily condition on the container top, and there were safe alternatives available to the longshoremen. However, Coastal and its longshoremen failed to perform their job in a workmanlike manner because they did not take the easy, available steps to remedy this hazardous condition. Clearly, those safe alternaties were not unduly impractical or time-consuming. The *Treadaway* case has no applicaton to the facts of this case; rather, this case is controlled by *Morris, Polizzi* and *Teply*.

container jump. Under well-established jurisprudence, Columbia was not legally responsible for Turner's injury.

The opinion of the district court accurately stated:

> As the longshoremen's testimony shows, the patch of oil was plainly visible to them during the daylight hours when they were first unloading the container. In these circumstances, "*Scindia* entitles the shipowner to rely on an 'expert and experienced stevedore' acting with 'reasonable care' " [to] correct or warn about the hazard. *Morris v. Compagnie Maritime des Chargeurs Reunis, S.A.*, 832 F.2d 67, 71 (5th Cir. 1987). Thus, in order to hold the shipowner liable, the plaintiff must also prove that "circumstances made safer alternatives unduly impractical or time-consuming." *Ibid.* The plaintiffs have presented no such evidence, nor have they presented any evidence that the stevedore was under any special time constraint; indeed, the defendants have presented evidence that at least two safer alternatives to jumping, or stepping, across container tops existed (climbing down one container and then up the other, or using a platform or ladder between the two container tops) and that oil spills are easily cleaned up such as with sand or sawdust.

(Writ Petition, p. A-4).

Accordingly, the district court correctly applied the first *Scindia* principle and found no vessel negligence. The Fifth Circuit correctly affirmed the district court's finding. The decisions of the

courts below in this longshoreman injury case under § 905(b) are well supported by the legal analysis recognized by the Supreme Court in *Scindia* and applied by the Fifth Circuit in *Morris, Polizzi* and *Teply* and provide no basis for granting a writ of certiorari.

B. The Fifth Circuit And The District Court Properly Concluded That The Second *Scindia* Principle Does Not Apply To This Case.

Under the second *Scindia* principle, a vessel owner is entitled to rely on the stevedore's expertise and reasonableness and has no duty to supervise or inspect the stevedore's operations, unless a contract, law or custom imposes that duty on the owner. *Scindia*, 451 U.S. at 172. Petitioners submitted no evidence suggesting that Columbia had a duty to inspect Coastal's operations under any contract, law or custom. As stated by the district court:

> There is no basis for finding that *Scindia's* second category may apply here inasmuch as there is no evidence that the shipowner was exercising any control over either the cargo containers or the vessel cranes (or over any other portion of the ship) at any time during the stevedore's operations.

(Writ Petition, p. A-4).

Petitioners cite *Masinter v. Tenneco Oil Co.*, 867 F.2d 892, 897 (5th Cir. 1989), for the proposition that obviousness of a danger is not relevant to the second *Scindia* principle. Columbia does not dispute that part of the *Masinter* holding. However, the vessel owner in *Masinter* contractually retained control of the stevedore's cargo operations, whereas Columbia did not retain control over Coastal Cargo's operations aboard the M/V SUCRE. Thus, the second *Scindia* principle, and hence *Masinter*, are irrelevant to the present case.

The lower courts' conclusion that the second *Scindia* principle was not applicable in this case was correct, because there was no evidence that Columbia exercised any control over the cargo operations. Thus, there is no basis for accepting a writ of certiorari on this issue.

C. The Fifth Circuit And The District Court Properly Held That The Third *Scindia* Principle Does Not Apply To This Case.

The third *Scindia* principle, known as the *Scindia* "exception," places a duty on the vessel owner to protect longshoremen when the vessel owner has *actual knowledge* of a condition that presents an unreasonable risk of harm to the longshoremen, as well as actual knowledge that the stevedore is not acting reasonably to protect the longshoremen. *Scindia*, 451 U.S. at 175-76; *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983). The courts below properly concluded there was no evidence that Columbia had actual knowledge either that oil was present on the container or that the stevedore would not correct the hazard.

The *Scindia* exception certainly does not apply in this case where the M/V SUCRE's crew had no actual knowledge that there was oil on the top of "the 20 foot container," no actual knowledge that this oily condition presented an "unreasonable risk of harm," and no actual knowledge that the vessel could not rely on the stevedore to remedy this condition. The uncontroverted evidence was that no one complained to the vessel's crew that there was oil on the container top.

Furthermore, Columbia was entitled to rely on Coastal, the independent expert employed to discharge this cargo, to take the necessary actions and precautions to protect the longshoremen from any unreasonable risk of harm atop the container. Here, as in *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 378 (5th Cir. 1988), the vessel owner is not required to possess extraordinary knowledge of

a stevedore's methods of operation. Instead, the vessel owner can rely on the stevedore to carry out its operation in a workmanlike manner and not expose its employees to unreasonable risks of harm. In fact, the only precautions necessary to prevent this accident were for Coastal to supervise its employees properly to prevent "container jumping," and for the longshoremen to follow Coastal's policy to report or remedy any unsafe condition.

The lower courts correctly found the third *Scindia* principle has no applicaton to this case. There was no evidentiary support that Columbia had actual knowledge of an unreasonable risk of harm to the longshoremen, or actual knowledge that Coastal was acting unreasonably in failing to protect the longshoremen. Accordingly, there is no basis for granting a writ of certiorari on this issue.

CONCLUSION

The district court properly accepted Petitioners' factual version of this incident and correctly concluded that there were no genuine issues of material fact from which a jury could find Columbia legally liable under *Scindia* and its progeny. Based on Petitioners' appellate brief, which mirrors Petitioners' writ application, the Fifth Circuit correctly affirmed the district court's decision. The undisputed facts established that the M/V SUCRE was in a condition such that an expert and experienced stevedore, acting with reasonable care, could safely perform its cargo operations with reasonable safety to its longshoremen. The condition allegedly causing Turner's injury was open, obvious, and known to Coastal and its longshoremen, and this condition easily could have been avoided or remedied by Coastal and its employees.

The courts below properly concluded that Columbia had not breached any legal duty under the first *Scindia* principle. Columbia

had no reason to anticipate the actions or inactions of this careless stevedore and its longshoremen, who failed to clean up an open, obvious and known oily condition, or the actions of a reckless longshoreman, Turner, who attempted container jumping in violation of his employer's safety rules, particularly where a safe alternative transfer method was readily available.

Finally, the district court properly found that Columbia had no duty to supervise or intervene in Coastal's cargo operatons, since there was no evidence that Columbia had actual knowledge of any unreasonable risks of harm — the oil on the container top and Turner's container jumping — or actual knowledge that Coastal was not taking reasonable action to protect its longshoremen. The Fifth Circuit correctly affirmed these findings of the district court.

Petitioners have presented no meritorious reasons for granting certiorari. Petitioners' writ application is simply a reproduction to this Court of exactly the same arguments which were presented to the Fifth Circuit and completely rejected by that Court. There is no basis whatsoever for Petitioners' allegations of error on the part of the district court in granting Columbia's motion for summary judgment or the Fifth Circuit affirmance of the district court's decision. For the reasons discussed, Respondents respectfully submit that this Court should deny Petitioners' request for a writ of certiorari.

Respectfully submitted,

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